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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 343

FRED A. ALEXANDER, et al.,
Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Subject Index

	Page
Opinion	2
Jurisdiction	2
The questions presented	2
Statement	5
Federal statutes involved	7
Reasons for granting the writ	8
A. Appealability of the order	8
B. A court should not grant a summary judgment on conflicting affidavits	13
C. The contract	22
D. A party is not required to submit his disputes for decision to his adversaries	28
Conclusion	35

Table of Authorities Cited

Cases	Pages
Alexander v. PMA, 9 Cir. 314 F.2d 690	33
Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 82 S.Ct. 1318	21
Amer. Locomotive Co. v. Gyro Process Co., 185 F.2d 316	21
California Prune & Apricot Growers Assoc. v. Catz Amer. Can Co., 60 F.2d 788	13
Cherico v. Brotherhood, 167 Fed.Supp. 635	34
Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99	34
Cunningham v. Erie RR Co., 2 Cir., 266 F.2d 411	34
Donnelly v. United Fruit Co., 40 N.J. 61, 190 Atl.2d 825	33
Drake Bakeries Ltd. v. Local 34, 370 U.S. 254, 82 S.Ct. 1346	21
Edwards v. Capital Airlines (Ct. of App.-D.C. 1949) 176 F. 2d 754, Cert. Denied 338 U.S. 885	30, 31, 32
Elgin J.E.R. Co. v. Burley (1945) 325 U.S. 711, 65 S.Ct. 1296	32

Pages

Ferro v. Ry. Expr. Agency Inc., 2 Cir., 296 F.2d 847..... 34
Ford Motor Co. v. Huffman, 345 U.S. 330..... 34

Goodall-Sanford, Inc. v. The United Textile Workers, 353 U.S. 550, 77 S.Ct. 920..... 8, 9

Hardcastle v. Western Greyhound Lines, 9 Cir., 303 F.2d 182 34
Hughes Tool Co. v. NLRB, 5 Cir., 147 F.2d 69..... 34

Kirschner v. West Co. (3 Cir., 1962) 300 F.2d 133..... 10

L. Haas Engr. & T. Co. v. Amer. Indep. Oil Co., 2 Cir., 289 F.2d 346 20
Lane Ltd. v. Larns Bros., 2 Cir., 243 F.2d 364..... 21
Lummus v. Commonwealth Refining Co. (DC-NY 1961) 195 Fed.Supp. 572 21

Mount v. Grant Int'l. Brotherhood, 6 Cir., 226 F.2d 604... 34

Newton Investigation Bureau, 93 NLRB 157..... 27

Pac. Ind. Co. v. McDonald, 9 Cir., 107 F.2d 446..... 12
Phoenix Tinware Co. Inc., 100 NLRB 528..... 27
Procter & Gamble Indep. Union v. Procter & Gamble Mfg. Co. (2 Cir., 1962) 312 F.2d 181..... 20

Radiator Specialty Co. v. Cannon Mills, 4 Cir., 97 F.2d 318 21
Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109..... 13
Ripling v. Superior Court, 112 Cal.App.2d 399, 247 P.2d 117 12
Ross v. Twentieth Century-Fox Film Corp., (9 Cir. 1956) 236 F.2d 632..... 9, 10

Smith v. Evening News Association, 371 U.S. 195.....33, 34
Standard Magnesium Corp. v. Fuchs, 10 Cir., 251 F.2d 455 13
Steele v. Louisville & N R Co., 323 U.S. 192, 65 S.Ct. 192..30, 34

Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 192 P.2d 182 13

U.S. Steel Workers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347..... 21

Statutes

	Pages
Code of Civil Procedure:	
Section 1182	13
Section 1281	14
Section 1291	23
Federal Arbitration Act:	
Section 4	13
9 USCA 2	14, 23
9 USCA 3	8
Landrum-Griffin Act:	
Section 14	3
Section 104 (29 USCA 414)	7, 24
28 USCA 1254(1)	2
28 USCA 1291	2, 8, 9
28 USCA 1292(a)(1)	2
28 USCA 1292(1)	8
28 USCA 1331	7
28 USCA 1337	7
29 USCA 151 et seq.	7
29 USCA 158	8
29 USCA 185	7
29 USCA 186	2, 5, 7, 8, 9
29 USCA 401 et seq.	7
29 USCA 402	7

Texts

5 Am. Jur. 2d, p. 578, Arbitration and Award	13
26 C.J.S. 234, Decl. Judg. § 105	12
Restatement of Trusts, 198	12

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The above named petitioners Fred A. Alexander, Louis D. Camaroda, George Cathro, Albert S. Dimond, Louis Freeman, Frank Marani, Ray C. Marvin, James Newell, and Earl D. Petersen, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth District entered in the above-entitled case on May 6, 1964.

OPINION

The opinion of the Court of Appeals for the Ninth Circuit is reported at 332 F.2d 266.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on May 6, 1964, and copies thereof are appended to this petition. (Appendix). Jurisdiction of this Court is invoked under 28 *USCA* 1254(1).

THE QUESTIONS PRESENTED ARE:

1.—Whether the District Court's order of July 19, 1964 on the defendants' motion staying a legal action for breach of a collective bargaining agreement pending arbitration is an appealable order. As a corollary, is an order in the nature of specific performance of the alleged covenant to arbitrate in a Sec. 301 action on a collective bargaining agreement a final judgment appealable under 28 *USCA* 1291; or is it an injunction appealable under 28 *USCA* 1292(a)(1); and, if it is, may the stay extend to the part of the action clearly legal, as for example an action for damages for breach of contract or an action for wages paid for a specific purpose and must the action stayed be wholly equitable to be a non-appealable order?

2.—Whether the District Court can, without a trial, where there are issues of fact presented by conflicting

affidavits, stay proceedings upon an alleged oral agreement to make a collective bargaining agreement, then in the process of being reduced to writing, which expected agreement is claimed to contain an arbitration provision.

3.—Whether a collective bargaining agreement which is in writing, and contains a specific provision that it may be changed only by a subsequent writing, and not by oral agreement or by custom, can be changed, altered and modified by an agreement not yet reached as to its terms, and which is in the long process of being reduced to writing. Does Sec. 14 of the Landrum-Griffin Act require a disclosed written contract, or may there be secret oral understandings materially altering the writings?

4.—Whether the plaintiffs, non-union employees, can be required to submit their disputes under a collective bargaining agreement to their adversaries for a final determination.

5.—Whether an agent compensated as such by the plaintiffs and also the exclusive statutory collective bargaining agent for all employees, may carry on a planned, purposeful and hostile discrimination against the non-union members that it represents, in both the negotiation and administration of the contract, and by selecting an arbitrary and seemingly innocent seniority date, which seniority date is under a former collective bargaining agreement adjudicated invalid as it gave union members preference in "registration," and to use "registration" which is in fact co-

extensive with union membership as a means for discriminating against non-union employees. It also presents the remedies available to these non-union plaintiff employees who seek to enforce their rights under the collective bargaining agreement and under the applicable statutes.

6.—Whether jointly trusteed funds of deferred contingent compensation earned in part by the non-union plaintiffs and paid under the collective bargaining agreement can be used exclusively for union employees' benefit by use of the designation of "registered" in the contract, as part of a planned and purposeful hostile discrimination of the exclusive statutory bargaining agent to make "registration" co-extensive with union membership. This involves the rights of non-union employees to follow their pay, generated on their individual services, and paid by their individual employers into the hands of both the employers association as paying agent and subsequently in part into the hands of these trustees and require this pay to be used as provided in the collective bargaining agreement or for all employees impartially.

7.—Whether a union by inserting a joint consent provision in collective bargaining agreement to "registration" and thus give itself a veto, can arbitrarily discriminate against non-union employees, while keeping its membership closed to plaintiffs?

STATEMENT

This is an action under Sec. 301 (29 *USCA* 186) of the *National Labor Relations Act* (R-20). It seeks damages for breach of contract (R-53). It seeks remedy by way of a writ of mandate (R-50) to require the registration of the plaintiffs to designate them under the contract as what they are, and were for a number of years, full time members of the ship clerk working force. It seeks declaratory relief to determine what are the terms and provisions (R-51) of this particular collective bargaining agreement for the maritime industry covering ship's clerks in the Port of San Francisco. It seeks to determine the rights of the parties in the Welfare and Pension Funds, and in the multi-million dollar Mechanization Fund (R-52). It seeks an adjudication by declaratory relief of the rights of these plaintiff employees (R-51) under the collective bargaining agreement to dispatch and employment and the priorities thereunder. It seeks declaratory relief arising from a planned, hostile and purposeful discrimination against these plaintiffs by their compensated agent and statutory collective bargaining agent, both in the making and the administration of the collective bargaining contract (R-40 and 51). It seeks the declaratory relief as to the right of compensation under the collective bargaining agreement and to determine the disposition of this compensation for these plaintiffs who are non-union employees, and seeks adjudication of the rights of the plaintiffs under the California statute against discrimination because of certain ages (R-40). The

third cause of action (R-43-4) is to recover the pay paid by employers to the defendant PMA, under the collective bargaining agreement, where the individual employers of the plaintiffs paid the full compensation of the contract to the defendant PMA, but PMA did not pay these benefits to the plaintiffs or for their use, nor remit their compensation in full to them. It seeks to recover damages for breach of contract. It seeks by a fourth cause of action (R-44) in declaratory relief as to the misuse of the provisions of "registration" under the collective bargaining agreement by confining full registration (Class A) to full book members of the defendant Local 34, and is used as a means of discrimination against these plaintiffs and all other non-union ship clerks.

On July 26, 1962, the plaintiffs through their counsel wrote the various defendants setting forth the plaintiffs' claims generally and suggesting that if there were any arbitration, this would be welcomed as a means of solving the dispute, but that the plaintiffs' counsel could find nothing in the collective bargaining agreements providing for such arbitration (R-117 and 107). After six weeks delay, and no response (R-107) the plaintiffs brought their suit on August 13, 1962. Not until nine months later in May 1963 (R-56) did the defendants move for summary judgment asking a stay of the proceedings, claiming that there were provisions in the collective bargaining agreement for arbitration. Conflicting affidavits were filed as to the provisions of the collective bargaining agreement (R-71, 103 and 115), and the plaintiffs set

forth in their affidavits (R-117 and 105-9) the request to arbitrate and the estoppel to contend there was any other contract than the one disclosed and acted upon by the plaintiffs. The District Court, by order of July 19, 1963, (R-182) upon these motions, and these conflicting affidavits, and without any trial of the issues, entered its order staying all proceedings pending the proceedings under the defendants' contention of provisions for grievance and arbitration, but the Court made no finding as to what these specific provisions were. This order was appealed and the Ninth Circuit affirmed this order, holding it not an appealable order. (Appendix)

The amended complaint is set forth in full in the Appendix.

Federal court jurisdiction of the court of the first instance is based on Sec. 301 (29 *USCA* 185, collective bargaining agreement), 28 *USCA* 1331 (Federal question), 28 *USCA* 1337 (commerce).

FEDERAL STATUTES INVOLVED

This case involves Sec. 301 of the National Federal Labor Relations Act, 29 *USCA* 185 (Breach of the Collective Bargaining Agreement), 28 *USCA* 1337 (Commerce), 29 *USCA* 186 (Jointly Trusteed Trust for Benefit of Employees). The collective bargaining agreement involves construction and validity of portions under 29 *USCA* 401 et seq., 402 and 414 (Labor and Management Disclosure Act) and 29 *USCA* 151

et seq., 158 (National Labor Relations Act). It involves the appealability of an order under 28 *USCA* 1292(1) and 28 *USCA* 1291 and by analogy the appeal from an order under 9 *USCA* 3, the Federal Arbitration Act.

REASONS FOR GRANTING THE WRIT

A. APPEALABILITY OF THE ORDER.

The decision below holds that this is not an appealable order. This Court in *Goodall-Sanford, Inc. v. The United Textile Workers,* 353 U.S. 550, 77 S. Ct. 920, clearly held that an order such as this is appealable under 28 *U.S.C.A.* 1291. It would appear to make no difference whether it was granted in an independent action brought by a party under Sec. 301 for arbitration, or whether it was by a cross-bill or by a Motion for Summary Judgment or Stay or similar relief. The principle is the same. In footnote No. 1 of the Ninth Circuit decision in this case, the Court attempts to differentiate the *Goodall-Sanford, Inc.* case on the basis that it was a decree ordering enforcement. To plaintiffs forced to seek their remedy at law under Sec. 301, a denial of a forum in the Courts pending arbitration is as effective as an order directing arbitration. They must arbitrate or lose all remedy.

Prior to this Ninth Circuit decision sought to be reviewed, the law was clear that in labor contract cases under Sec. 301 the rule applicable to appeal in

Arbitration Act suits in equity had no application as *Goodall-Sanford, Inc. v. U. S. Textile Workers,* 353 U.S. 550 clearly established the law that an order requiring arbitration in a Section 301 suit was not a step in the judicial proceedings for the enforcement of a claim, nor ancillary thereto, but is the full relief. An order in such a Sec. 301 suit is a final decision within 28 *U.S.C.* 1291 and appealable. Now it appears in great confusion. It makes no difference under the Arbitration Act decisions whether it be a stay pending arbitration or an order to arbitrate, either is an appealable order, nor does it matter whether the plaintiff or the defendant asks for this order, it is still appealable. The Ninth Circuit decision sought to be reviewed limits the *Goodall-Sanford, Inc.* case rule solely to decrees ordering enforcement of arbitration sought by a plaintiff in an action solely for such a decree. It provides a different rule as to stay orders or proceedings instituted by defendents. This Court did not in its decision make any such distinction but clearly held any order requiring arbitration of a labor contract Sec. 301 action was appealable. It did not say only proceedings by plaintiff resulting in the order were appealable. The decision of the Supreme Court is sound, logical and based on good reasoning. There is no reason for its reversal in part or in whole.

The Ninth Circuit decision in this case states that an order staying an action pending arbitration is not an appealable order. Under this the decision cites *Ross v. Twentieth Century-Fox Film Corp.* (9 Cir.

1956) 236 F.2d 632, 633 and *Kirschner v. West Co.* (3 Cir. 1962) 300 F.2d 133, 134.

Ross v. Twentieth Century-Fox Film Corp. (9 Cir. 1956) 236 F.2d 632, 633 holds:

> "This is an appeal from an order, entered in an action for breach of contract, requiring that all proceedings in the case be stayed to permit the submission of the disputed issues to arbitration. The order is interlocutory. However, such a staying of a common law type action for breach of contract is now authoritatively held to be available under Sec. 1292 (1) of Title 28 of the U.S. Code. *Baltimore Contractors, Inc. v. Bodinger,* 1955, 348 U.S. 176, 75 S. Ct. 249, 99 L. Ed. 233."

The Ninth Circuit decision in this case holds that the amended complaint, although one seeking damages and although it is an action for money paid by the employers of the plaintiffs to PMA and others, is essentially one in equity and is therefore a stay by a court of equity of its own proceedings and is not an appealable injunction. It cites in support of this several cases, including *Kirschner v. West Co.,* supra, and in footnote No. 3 it points out that the *Kirschner* case was one count legal and one count equitable, and thus the stay was a step in equity in the control of litigation rather than an appealable injunction of an action at law.

Kirschner v. West Co. (3 Cir. 1962) 300 F.2d 133, was an action upon a contract for disclosure of a trade secret involving fiduciary or confidential relationships

wherein a process for a rubber or synthetic coating for bottle stoppers were disclosed and the defendant promised to pay certain royalties. It sought an injunction, and an accounting for royalties. The Court held it was wholly equitable, not part legal:

> "What has been said compels us to the conclusion that the plaintiffs' claim, prior to the fusion of law and equity, would have 'sounded' in equity and accordingly, under the teaching of *Baltimore Contractors v. Bodinger,* supra, the stay of proceedings ordered by the Court below is not appealable under Sec. 1292(a)(1)."

The Ninth Circuit decision in this case states that although it asks for damages that it is essentially one in equity. It states that the prayer asks for a mandatory injunction directing plaintiffs' registration as ship clerks, for declaratory relief and asks for an imposition of trust upon the funds held by the trustees of the Welfare and Pension Fund. The prayer of the amended complaint (R-50 at line 30) states:

> "1. That the Court direct and order in the nature of a Writ of Mandate that the defendant Joint Clerks Labor Relations Committee to properly register the plaintiff's name as fully registered under the said collective bargaining agreement (Class A) as of the proper date therefor for each plaintiff."

It makes no mention of any mandatory injunction to register.

It is true that the complaint does ask to determine the collective bargaining agreement and that it consists solely of the writings and to construe these writings. (See R-50-3 for prayer). It does ask to impose a trust. However, an action to impose a trust of this nature for money paid to use immediately and unconditionally is actually one in *indebitatus assumpsit*.

Restatement of Trusts 198.

Ripling v. Superior Court, 112 Cal.App.2d 399, 247 P.2d 117, contains an excellent and interesting discussion and collection of authorities on the legal action against a trustee for trust monies collected to be paid another as P.M.A. collected money from the individual employers under the terms of the collective bargaining agreement to pay to the plaintiff and for certain specific uses. In the *Ripling* case the Court held:

> "As presently restated the guiding principle is that '(i)f the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment.' Rest., Trusts Sec. 198(1); see also Scott on Trusts, Sec. 198.1."

A declaratory relief action is neither legal nor equitable but *sui generis*.

26 *C.J.S.* 234, Decl. Judg. § 105.

In a declaratory relief action where the issues are legal, jury trial is a matter of right.

Pac. Ind. Co. v. McDonald, 9 Cir., 107 F.2d 446.

B. A COURT SHOULD NOT GRANT A SUMMARY JUDGMENT ON CONFLICTING AFFIDAVITS.

The defendant P.M.A. noticed a motion (R-56) seeking to dismiss the complaint, and for summary judgment for stay pending arbitration. A stay pending arbitration is specific performance of the alleged contract to arbitrate. A proceedings under the statute to require arbitration, although in the form of a special proceedings, is in substance a suit in equity for specific performance of the contract to arbitration requiring findings like any other determination in equity.

Trubowitch v. Riverbank Canning Co., 30 Cal. 2d 335, 192 P.2d 182 at 190.

California Prune & Apricot Growers Assoc. v. Catz Amer. Can Co., 60 F.2d 788, referred to arbitration under the California arbitration statute, C.C.P. 1182:

> ". . . and this is in the nature of an equity suit in that it seeks specific performance."

Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, referring to the N. Y. arbitration statute:

> ". . . the purpose of the statute was to make specific performance compellable."

5 *Am. Jur. 2d*, 578, Arbitration and Award 78 refers to proceedings to enforce arbitration as "specific performance" of the contract to arbitrate.

Standard Magnesium Corp. v. Fuchs, 10 Cir., 251 F.2d 455, referred to the Federal Arbitration Act, Section 4, as a summary remedy in the nature of specific performance.

In the case at bar, the District Court in the order on appeal, upon conflicting affidavits, ordered the action stayed pending arbitration. It made no findings. It made no indication or direction as to what such proceedings to arbitrate are, as must be in any decree of specific performance. It is no remedy for the plaintiffs to be required to arbitrate under some unknown, indefinite, and secret oral contract, and at every turn they must guess as to what step to take and to be told they have acted improperly or untimely. Under the *Federal Arbitration Act,* 9 *USCA* 2, a contract to arbitrate must be in writing. Under the California statute, *C.C.P.* 1281, a contract to arbitrate must be in writing.

The motion for summary judgment was made upon the affidavit of Robertson (R-75) that sets forth contended contract provisions that do not appear in any of the written documents set forth in the amended complaint. Plaintiff Marvin's affidavit on summary judgment (R-115) sets forth that the collective bargaining agreement is that set forth in the amended complaint, consisting of eleven writings. It quotes the provision as to modification, and states the provisions set forth in the Robertson affidavit are no part of the collective bargaining agreement, but are part of Sec. 17 of the Longshore Agreement of May 1962, a separate and distinct agreement covering solely longshoremen and not ship's clerks, whose collective bargaining agreements are separate and distinct therefrom. And it sets forth that the plaintiffs are entitled to a jury trial as to the factual issue of the contract

and its context. And it states that the ship clerks' agreement contains no provisions as to grievance or arbitration applicable to these plaintiffs, as alleged in the Amended Complaint.

Marvin's affidavit (R-117) sets forth that on June 26, 1962 plaintiffs through their counsel demanded of ILWU, Local 34, PMA, Port Committee, and of the defendant trustees that if there were any mechanics or provisions as to arbitration, that they would welcome such mechanics of arbitration to solve the dispute or any phase thereof. And that the defendants and each of them refused to reply to this written communication and as a result thereof the plaintiffs filed their action on August 13, 1962, six weeks thereafter. That the defendants cannot refuse to arbitrate and ask to stay this action required by their refusal to arbitrate.

The affidavit sets forth that this action has been pending since August 13, 1962 and that no request was made to arbitrate until the motion was noticed in May, 1963, some nine months thereafter, and that this is waiver of the provisions as to arbitration, if any.

Plaintiffs' counsel filed his affidavit (R-103) and states that the collective bargaining agreement covering the ship's clerks in the Port of San Francisco is the written contract set forth in the amended complaint, and consists of the eleven documents starting with the Master Agreement of 1952. It quotes parts of the provisions of the Master Agreement, that it cannot be amended, modified, changed or its provi-

sions waived, except in writing executed by the parties. It also sets forth that portions of Sec. 17 quoted in Robertson's affidavit (R-71) are extracts from the Longshore Agreement of May 9, 1962, which by its terms applies solely to longshoremen and not to ship clerks who have a separate, collective bargaining agreement. His affidavit also sets forth other portions quoted in Robertson's affidavit appear to be taken from proceedings of the defendant committee in 1954, and unquoted portions of those minutes state it is not to change the Master Agreement. Counsel's affidavit (R-105) states that in the fall of 1961, he as the attorney for another ship's clerk, Roy Bliss, made a demand in writing under the Landrum-Griffin Act, Sec. 104, to inspect the collective bargaining agreement, and pursuant thereto the said Bliss did inspect the writings and looked for provisions applicable to grievances or arbitration, and found none applicable to "non-registered" non-union ship clerks. Bliss brought affiant the list of writings, and this list consisted of the Master Agreement of April 1952, and subsequent written changes substantially as listed in the Amended Complaint, with a few omissions therefrom.

The affidavit states the affiant thereupon called Mr. Ernst, attorney for the defendant PMA, whose office provided a list of writings constituting the ship clerks contract, and these are the writings substantially set forth in the complaint, omitting only the portions which were regulations or proceedings of the defendant committee, a creature of the agreement and not

authorized or empowered to change, alter, or amend the collective bargaining agreement.

This affidavit (R-107) states that this affiant as attorney for the nine plaintiffs, on June 26, 1962 wrote the defendants and sent copies to their counsel stating:

> "As in that prior action, I have examined the joint bargaining agreement, and I can find no provisions for arbitration machinery, for disputes involving either matters of registration or dispatch. If you know of any such mechanics or terms in the collective bargaining agreement as to arbitration covering these matters, I would welcome the mechanics of arbitration to solve these disputes, or any phase of them on behalf of my clients."

The affidavit (R-107) states that none of the defendants or their counsel responded orally or in writing and as a result thereof the plaintiffs filed their action on August 13, 1962. The affidavit states that the defendants having refused to arbitrate and having subsequently required the plaintiffs to resort to judicial remedy, cannot now be heard to ask to stay the proceedings required to be commenced for their failure to respond or to arbitrate.

This affidavit also attaches pages 20 to 23 of the Clerk's Master Agreement of 1952 as to arbitration. No part thereof is applicable to this action. The affidavit states that the defendants may not make grievance procedure to be submitted to the defendants themselves, or require the plaintiffs to submit their

cause to interested party defendants for determination or control. The affidavit also states that adversaries are not competent to pass upon their own wrongs and their own breaches of contract, nor to conduct the plaintiffs' cause of action.

The affidavit of counsel (R-105) states that in August 1962 there arose a grievance by the American President Lines against a certain Roper, a ship clerk, a client of the affiant in another action. The defendant Local 34 as exclusive bargaining agent undertook to represent the said Roper as a "non-registered" clerk in said matter, and in line with its planned and hostile action against all such ship clerks not holding full book membership in said local, proceeded to conspire with the employer member and permanently barred said Roper from all employment as a ship clerk, although Roper had many years of experience and a good and clear record, and although the collective bargaining agreement did not authorize said "punishment."

The affidavit states (R-108) that the affiant as attorney for Roper immediately requested an arbitration under the Master Agreement, and sent letters therefor in connection with the said attempted arbitration to the defendant *Committee* and to the union, and to both their counsel, and to the area arbitrator. The said area arbitrator ruled in writing that the said Roper was a "non-registered" ship clerk, and had no remedy of arbitration under the collective bargaining agreement and refused said arbitration.

Counsel's affidavit (R-105) states that in communications with Ernst, attorney for PMA, involving the Roper matter during November 1962, the said Ernst quoted affiant provisions as to grievance and arbitration (similar to that set forth in the Robertson affidavit) and stated that the same was orally agreed upon in substance, but the matter had not yet been reduced to writing nor had the exact language been agreed to by PMA and the Union.

Counsel's affidavit (R-109) sets forth that any attempt to arbitrate is a useless act for the reason that the collective bargaining agreement does not provide for arbitration nor for grievances of differences involving the defendant Port Committee in registration or dispatch of the plaintiffs, and in other matters the defendants and the arbitrator have refused to hear and determine such matters that involve "non-registered" non-union ship clerks.

The deposition of Mr. Paul St. Sure, president of the defendant PMA (R-106) taken on May 1, 1963 involved testimony that beginning with the Clerk's Master Agreement of April 1952 and some twenty subsequent amendments were being "codified" and that the PMA draft thereof had been sent to ILWU who was examining the same and the wording will thereafter have to be worked over and agreed upon. That the Pacific Coast Longshore Agreement of May 1, 1961 (which by its terms covers solely longshoremen) was reduced to writing and took until May 1962 before its wording was agreed upon and signed.

Drafting required extensive negotiations to reduce the language to writing acceptable to both PMA and ILWU. There is an oral, not written agreement, to use much of the longshore written agreement in the clerks' collective bargaining agreement, so there will be but a single agreement for all employees in the maritime industry.

St. Sure testified on the deposition (R-104) that the clerks' collective bargaining agreement is not all written, but part oral, parts are awards, and parts are proceedings of the Coast and other committees such as the defendant Committee.

A summary judgment to arbitrate should not be granted where there are conflicting affidavits as to the contract.

Procter & Gamble Indep. Union v. Procter & Gamble Mfg. Co., 2 Cir. 1962, 312 F.2d 181.

Where it is contended there is a contract involving an agreement to arbitrate, and there is conditional acceptance in issue on conflicting affidavits, as to whether the condition was performed or not, and whether the contract thus existed, it is a matter to be tried by the court as other cases are tried, not on conflicting affidavits.

L. Haas Engr. & T. Co. v. Amer. Indep. Oil Co., 2 Cir., 289 F.2d 346.

There must not only be no issue as to the making of a valid contract including an agreement to arbitrate, but there can be no waiver of the right to arbitrate.

Waiver can arise from the active participation or pleading in a lawsuit without immediately taking steps for arbitration.

Amer. Locomotive Co. v. Gyro Process Co., 185 F.2d 316.

Whether there is a valid contract requiring arbitration or not is an issue of fact to be tried by the court or by a jury, unless a jury is waived.

Lummus v. Commonwealth Refining Co., DC-NY 1961, 195 Fed. Supp. 572.

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration a dispute he has not agreed to arbitrate.

U.S. Steel Workers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347;

Drake Bakeries Ltd. v. Local 34, 370 U.S. 254, 82 S.Ct. 1346;

Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 82 S.Ct. 1318.

The *Drake Bakeries* case, 370 U.S. 254, holds arbitration can be ordered and proceedings stayed only when the collective bargaining agreement requires the controversy arbitrated, and that this right to arbitrate can be waived, citing in footnote 17 *Lane Ltd. v. Larns Bros.*, 2 Cir., 243 F.2d 364. The *Lane* case held that where one sought arbitration and was forced to abandon the demand and seek judicial relief, the defendant cannot defeat the judicial action by asking arbitration. The *Lane* case cites *Radiator Specialty Co. v. Cannon Mills*, 4 Cir., 97 F.2d 318, holding that

a delay of nine months (the time involved in the case at bar, August 1962 to May 1963) after suit was filed before seeking the remedy of arbitration in the contract is a *waiver* of this provision to arbitrate.

In the case at bar there was a suggestion of arbitration made by plaintiffs on June 26, 1962 which did not even get the courtesy of a reply. Suit was necessitated by this refusal and was filed August 13, 1962. Not until May 1963 was even a motion or request to arbitrate made by the defendants. Were there any contractual provisions to arbitrate, there is a waiver. Granting of the summary judgment motion by the stay on the affidavits was clearly error. This case presents a clear cut factual situation presenting waiver of any contended contractual provisions to arbitrate. With the mass of labor arbitration matters involving vital interests of both employer and employee, this Court has an opportunity to clarify and establish this very important point of law of labor relations in this case.

C. THE CONTRACT.

Another very important point clearly presented and which should be clarified by the decision of this Court is the question as to whether the collective bargaining agreement must be in writing, and whether the contractual provisions as to arbitration with its detailed machinery must be in writing.

Under the Federal Arbitration Act, 9 *USCA* 2, an agreement to submit an existing or future controversy to arbitration must be in writing. Under California law, such an agreement must also be in writing. *CCP* 1291. It would appear that the same reasoning would apply to labor collective bargaining contracts in so far as arbitration is required. It would be indeed a strange situation where a non-union employee and his employer act upon and there is incorporated into the master and servant relationship the disclosed collective bargaining agreement, and then when a dispute arises find that the employers' association and the union statutory exclusive bargaining agent for the employees claim there is a secret understanding or modification or waiver arising from their former breaches of the very provisions in issue that change, alter and modify the contract as written and disclosed and acted upon, and that this oral agreement contains a provision requiring arbitration of the dispute, not contained in the disclosed written contract. This would, if oral agreements are permitted as to arbitration, completely defeat and stay any attempted resort to the courts to enforce the written contract as disclosed and acted upon.

The Taft Hartley Act contemplates that the contract be reduced to writing, and executed as the final step in the collective bargaining process as it makes it an unfair labor practice to refuse to do so. This provision in the Master Agreement in the case at bar requiring any change, modification or alteration of the written agreement to be in writing is a sufficient de-

mand to require any change to be reduced to writing and executed.

The Landrum-Griffin Act, Section 104 (29 *USCA* 414) is a wholesome and necessary law permitting any employee to determine the terms of the collective bargaining agreement by inspection of the written documents. This Act of Congress would be wholly defeated and meaningless if it were proper to show an employee under this Act a written contract, and then to permit the Union or the employer or both to contend that this is not the contract, but it is materially changed and altered by a parol, secret agreement or by waivers of conduct of the employer and the union, or others by breach of the contract. Section 104 was enacted by Congress to correct a vicious practice of the Union and the employer having secret agreements very disadvantageous to the working man. When differences arose, the working man was faced with these secret agreements. The purpose of Congress was to permit the employee to learn the full terms of the collective bargaining agreement under which he was employed. To permit secret or oral understandings or modifications as contended by the defendants and upon which the order on appeal is based, is to make the Act of Congress meaningless, and to defeat its very purpose.

There is also an estoppel against the defendants contending the contract is other than that disclosed by the writings. Inquiry was made both under the Landrum-Griffin Act, section 104, and through counsel. Defendants are not now in a position to contend

the written contracts they disclosed, and the plaintiffs acted upon is different, and that there is some other and different, oral, secret agreement. When any plaintiff accepts dispatch, the terms of the collective bargaining agreement is incorporated and implied into the master-servant relationship. It is the known and disclosed written contract that is part of this employment, and the defendant Union and the defendant PMA are *estopped* to contend it is different, or that the contract is not as it was acted upon, particularly the disclosed terms of compensation, including deferred contingent compensation (fringe benefits), for both the individual employer and the plaintiffs believed this applied, and PMA was paid by the individual employers upon this disclosed contract. The difficulty arises that PMA has not paid out the monies it received from the individual employers of the plaintiffs, but has fattened its pocket by retaining the difference.

The defendant PMA and the other defendants, having been caught with their hand in the cookie jar, and realizing that this involves very substantial sums of money unpaid to the plaintiffs and others similarly situated, have undertaken to amend the facts and contend there is a secret oral understanding over an indefinite period changing, modifying and altering the collective bargaining agreement and obliterating from the agreement much of the solemn written contracts, including the Master Agreement for Clerks of April 1952, and all subsequent modifications thereof in writing (even as late as June 22, 1962).

It is a serious situation in which the plaintiffs find themselves, very second class citizens. The large minority of non-union ship clerks find themselves with the less profitable and unwanted work refused by the union members who, through being a majority, can retain this union as the exclusive statutory bargaining agent who makes and enforces the contract.

The plaintiffs and the other non-union ship clerks receive only a part of the pay their employers pay to PMA. Their health and welfare fund contributions are used solely for the Union members. When they seek to enforce the written contract as disclosed, they are met with the contention that this is not the contract, but there are other secret oral agreements changing these writings. These petitioners suggest arbitration and get no reply. The written contract as disclosed provides them no remedy by arbitration. They file suit. Nine months later, after extensive motions, pleadings and procedures, they are faced with a motion for summary judgment upon claimed contract provisions to arbitrate not previously disclosed, and which has only been orally agreed upon in substance but not reduced to acceptable language nor executed. Upon this, they are denied any forum at all. Should they seek arbitration, it is under a vague, indefinite oral agreement covering arbitration, and to be told at every turn they took the wrong step or did not act timely. This is no remedy. They cannot by this secret oral agreement be required to submit their cause to their adversaries for final determination.

It is not possible for the parties under federal statutes applicable to these jointly trusteed trusts to provide that non-union employees shall have their contingent deferred compensation earned on their labor taken from them and given by the trustees to union members only. This is just what has happened in this case.

The Welfare and Pension Fund payments generated on the plaintiffs' services are used solely for union members, under the guise of calling them "registered".

The earnings of the plaintiffs, generated for hours of work and contracted to be paid into the Mechanization Fund are not used for the plaintiffs, but are probably held by PMA and, if any part is eventually paid to the trust fund, it will be used solely for a union member employee and not for the plaintiffs and the other non-union employees, simply by not designating them as "registered".

The collective bargaining agreement provided for "joint consent" in "registration" without any standard or test for the union's exercise of this control and veto. A clause in the contract requiring those newly employed to be "recognized by the union" (*Phoenix Tinware Co. Inc.*, 100 NLRB 528) or to be "satisfactory to both parties to this agreement" (*Newton Investigation Bureau*, 93 NLRB 157) grants a veto power beyond the intent of the union security provisions of Section 8(a)(3) of the Taft-Hartley Act and is therefore illegal and void.

This case presents a question that is an important one requiring a decision of the Supreme Court. How far can a union in its planned and hostile discrimination as a statutory exclusive bargaining agent go in its action toward non-union workers who it refuses to admit to its membership? Can it use their earnings in deferred contingent compensation solely for its own union membership? Can it make oral secret agreements to arbitrate and prevent the non-union employee seeking judicial enforcement of the contract or judicial determination of what the contract is and how it applies to non-union workers? Does this authority extend to requiring the non-union employees to submit their controversies with the union and employers' association to their adversaries for determination? What, if any, are such non-union workers' remedies?

D. A PARTY IS NOT REQUIRED TO SUBMIT HIS DISPUTES FOR DECISION TO HIS ADVERSARIES.

Since the policy of the law favors enforcing collective bargaining agreements to arbitrate disputes, the mechanics and methods of these arbitration proceedings become more and more important. Many of these contractual provisions are drawn with a view of a dispute between the employers on one side through the employers' association and the employees through their union collective bargaining agent on the other. Some written agreements are drawn as the Master Agreement for Clerks of 1952 in this case is drafted, to

exclude all non-registered ship clerks (and where the union retains power to have affirmative assent to any "registration" there just are no non-union employees given full "registration") from any remedy of arbitration. It does permit its union membership grievance machinery by appeal to the defendant committee where the Union vote is necessary for any action. Only if the Committee fails to agree by each vote, the employer and the employee members not concurring, can resort be had to another step or to arbitration. This arbitrator is selected by the defendant PMA and the defendant Union and may be removed by them. It is not likely any arbitrator would take his lucrative job in his hands to make other than a ruling in favor of these defendants.

Were the plaintiffs "registered", even then matters of dispatch and "registration" are specifically excluded from arbitration. Only with oral changes of the disclosed written contract is there provisions for arbitration, and then before the defendant Committee, their adversary and composed of their other adversaries, PMA and the Union representatives. Should it ever get to arbitration it is not before a neutral and disinterested person.

The grievance machinery is made so that it works only for the "registered" worker, those belonging to this closed group, the full book members of defendant Local 34, ILWU. Actually a union exists solely to fight the battle of all employees within its jurisdiction, and not to favor a faction of those employees. When it represents only a faction and is used as an instru-

ment of oppression for a minority, it perverts and destroys all concepts of fair play and any semblance of justice.

It is a basic concept of fair play that a person have some semblance of justice in some tribunal somewhere to try the disputes arising out of the collective bargaining agreement and its administration.

In the case at bar, there is absolutely no provision for any grievance or arbitration arising from misconduct or breach of the contract by the defendant Committee who does the actual dispatching through elected dispatchers in the jointly operated hiring halls, and who maintains and keeps these lists of "registration", which are in fact a list of the membership of defendant Local 34 ILWU. The collective bargaining agreement is very carefully and cleverly drawn to permit the discrimination against non-union employees and to prevent the remedy by any impartial arbitrator, and to require all matters to pass through both the port committee and the coast committee.

A similar situation arose and was urged in *Steele v. Louisville & N R Co.*, 323 U.S. 192, 65 S.Ct. 192, where it was urged that the employees had an administrative remedy before the Board under the Railroad Adjustment Act consisting of members chosen by both the employer and the Union. The Supreme Court held that this was no remedy because of the planned and purposeful discrimination of the Union.

In *Edwards v. Capital Airlines* (Ct. of App.-D.C. 1949) 176 F.2d 754, Cert. Denied 338 U.S. 885,

certain plaintiffs brought an action after an adverse ruling before the Board under the Airline Act, consisting of two employers and two Association (union) members. The Court pointed out that the grievances as to seniority though nominally against the employer company, was against the other employees, and the company was a mere bystander, and the Union could have taken a neutral position, but it did not, and took a position adverse to appellants.

The *Edwards* case, 176 F.2d 754, points out that where there is a conflict of interest, a party does not have to submit his disputes for decision to his adversaries, and that Congress did not intend to submerge the minority's interest in the grievance machinery provided, and the employees had a right to have their grievance heard by more than the Union and the employer, for Congress anticipated and contemplated an effective participation. The case held that although there was normally a presumption of validity to the acts of the Board provided by an Act of Congress, yet it was subject to potentially extremely dangerous situations that would affect the rights of the minority non-members, and the Court removed the doctrine of finality from the Board's action.

The *Edwards* case, 176 F. 2d 754, is particularly applicable here, for any grievance machinery which relegates the employees to the hands of their adversaries, and which would require the very entity, the defendant Committee who is conducting the hiring halls and making the registrations to denounce them-

selves and their own conduct is a very strong showing; further, the *Edwards* case would prevent any arbitration being final, where the Union (and here the employers' association as well) select the arbitrator. Of course if an arbitration is not final, the Courts will not stay judicial proceedings even where there is a valid contract to arbitrate. It is a particularly strong case, where both the unions and the PMA have been breaching the contract, and the employers' association has been pocketing substantial sums of money paid by individual employers for non-union employees' compensation and the part not diverted was used solely for the benefit of the defendant union's membership.

It is hardly one's idea of fair play to be required to submit one's cause to an arbitrator who holds his appointment and his lucrative arbitrations from the defendants, and expect the arbitrator to take a lucrative job in his hands to rule adversely to them.

A case by analogy is that of *Elgin J.E.R. Co. v. Burley* (1945) 325 U.S. 711, 65 S.Ct. 1296, where a Union collective bargaining agent settled a monetary claim for penalty wages under the Railroad Adjustment law. The Court on page 733 points out that a collective bargaining agent has the authority to represent the employee before the Board but that in any matter involving settlement, the employee has a voice in it and Congress did not intend to submerge the individual and the minority interest and nullify the rights of the employee. On page 736 the Court held that the Act of Congress gives more than the mere

right to be heard by a Union and a carrier in two alternative situations, first where the Union in its action would do more than remotely affect the other employees, or in the alternative situation where the interest of the employee involved, is that of a non-member of the union, or the interest are opposed to the collective interests of a large number of employees represented by the Union, or the Union is hostile.

An interesting decision, collecting many important authorities, is that of *Donnelly v. United Fruit Co.* 40 N.J. 61, 190 Atl.2d 825, holding that an employee under a collective bargaining agreement can conduct his own grievance without submitting this to the control of the union statutory collective bargaining agent. It collects a number of decisions, including those requiring such an agent to act for all employees impartially and equally.

Prior to the Ninth Circuit decision in this case in *Alexander v. PMA,* 9 Cir. 314 F.2d 690, it appeared to be, in counsel's opinion, the established law that Federal Court jurisdiction was based upon and there was an enforceable remedy for hostile and purposeful discrimination by the exclusive statutory bargaining agent for the employees. This decision holds that where this purposeful and hostile discrimination is toward non-members of the Union, it is an unfair labor practice and the courts no longer have any jurisdiction unless there is specifically covenant in the collective bargaining agreement against discrimination on the basis of lack of union membership similar to the covenant in *Smith v. Evening News Association,*

371 U.S. 195 (as there is in this case). Before this first *Alexander* case decision, there was Federal Court jurisdiction, in counsel's opinion, based on the line of cases of *Steele v. Louisville, etc.*, 323 U.S. 192, *Ford Motor Co. v. Huffman*, 345 U.S. 330, *Hardcastle v. Western Greyhound Lines*, 9 Cir., 303 F.2d 182, *Mount v. Grant Int'l. Brotherhood*, 6 Cir., 226 F.2d 604, *Cherico v. Brotherhood*, 167 Fed.Supp. 635, *Cunningham v. Erie RR Co.*, 2 Cir., 266 F.2d 411, *Ferro v. Ry. Expr. Agency Inc.*, 2 Cir., 296 F.2d 847, *Hughes Tool Co. v. NLRB*, 5 Cir., 147 F.2d 69, *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, and others. Indeed the NLRB has taken the position that it does not have power to supervise the manner in which the statutory exclusive bargaining agent performs its duty. No remedy other than a contract action remains.

Are these petitioners to be relegated to the law of the jungle and the mercy of the defendant union and its membership who are able to retain their union as this exclusive statutory bargaining agent? Is there not some remedy before some court or in some tribunal somewhere to which these non-union workers may turn or is the door slammed in their faces on the basis there is an oral understanding between the defendants that stays all recourse to the courts? After suit is filed, may defendants by agreement among themselves defeat the plaintiffs' action? Being required to submit one's disputes to decision of one's adversaries is not any concept of fair play, nor is it any remedy.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
July 31, 1964.

HOWARD B. CRITTENDEN, JR.,
Attorney for Petitioners.

(Appendix Follows)

Appendix

[Title of Court and Cause]

[May 6, 1964]

Upon Appeal from the United States District Court for the Northern District of California, Southern Division

Before: POPE, JERTBERG and MERRILL, Circuit Judges

MERRILL, Circuit Judge:

This case was before us once before and was remanded to permit amendment of the complaint in the light of *Smith v. Evening News Association* (1962) 371 U.S. 195. The nature of the plaintiffs' grievances is set forth in our earlier opinion. *Alexander v. Pacific Maritime Association* (9 Cir. 1963) 314 F.2d 690.

Plaintiffs have now amended their complaint and further proceedings have been had in the district court. Plaintiffs picked up their discovery efforts at the point where they had been left by the earlier order of dismissal and appeal to this court, and thereafter applied to the district court for sanctions under Rule 37, F.R.C.P. for failure of defendant Pacific Maritime Association to answer certain interrogatories. Defendants countered with motions for summary judgment and, in the alternative, for stay of proceedings pending resort by plaintiffs to the grievance-arbitration machinery provided by collective bargaining agreement.

The district court denied plaintiffs' motion for sanctions, granted defendants' motion for stay and stayed disposition of the remaining motions "pending disposition of the case on arbitration."

Plaintiffs have appealed from that order and the matter is before us at this time on appellees' motion to dismiss the appeal.

Appellees contend that the order is not an appealable one. We agree.

It is well settled that a stay of an action pending arbitration is not a final judgment appealable under 28 U.S.C. §1291. *Ross v. Twentieth Century-Fox Film Corp.* (9 Cir. 1956) 236 F.2d 632, 633; *Kirschner v. West Co.* (3 Cir. 1962) 300 F.2d 133, 134; *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283* (2 Cir. 1959) 269 F.2d 618, 620-621.[1] Nor can the stay granted here be deemed an injunction appealable under 28 U.S.C. §1292(a) (1), which allows appeals from "interlocutory orders * * * granting, continuing, modifying, refusing or dissolving injunctions * * *." For although a stay of proceedings pending arbitration (or on some other equitable ground) is regarded as an injunction if it can be analogized to an equitable restraint of legal proceedings, this theory of appealability is limited to cases in which the action stayed is

[1]The granting of a stay of proceedings pending arbitration is thus to be distinguished from the final judgment status that would be accorded a *dismissal* of the action on the ground arbitration must first be pursued, cf., *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283, supra,* or a decree ordering enforcement of an arbitration provision of a contract, rendered in an action seeking only such enforcement, *Goodall-Sanford, Inc. v. United Textile Workers of America* (1957) 353 U.S. 550.

wholly or basically and predominantly an action at law.[2] While plaintiffs here included in their demand for relief a prayer for money damages, this demand follows and is plainly subordinate to prayers for (1) a mandatory injunction directing plaintiffs' registration as ship clerks by defendant Joint Clerks Labor Relations Committee, (2) declaratory relief, and (3) an accounting and imposition of a trust in plaintiffs' favor upon funds held by the trustees of a union-employer association welfare and pension fund.

Thus, in our judgment the amended complaint is essentially one in equity. By its nature, then, the stay is a stay by a court of equity of its own proceedings and therefore is not an appealable injunction. See *Baltimore Contractors, Inc. v. Bodinger* (1955) 348 U.S. 176; *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283, supra; Wilson Brothers v. Textile Workers Union of America* (2 Cir. 1955) 224 F.2d 176, cert. denied (1955) 350 U.S. 834; *Kirschner v. West Co., supra.*[3]

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[2]See, e.g., *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.* (1935) 293 U.S. 449; *Ross v. Twentieth Century-Fox Film Corp., supra; City of Thibodaux v. Louisiana Power & Light Co.* (5 Cir. 1958) 255 F.2d 774, 776-777, reversed on other grounds (1959) 360 U.S. 25; *Council of Western Electric Technical Employees-National v. Western Electric Co.* (2 Cir. 1956) 238 F.2d 892; *Ring v. Spina* (2 Cir. 1948) 166 F.2d 546, cert. denied (1948) 335 U.S. 813.

[3]In the *Kirschner* case, although one count of plaintiff's complaint, seeking recovery of royalties under a licensing agreement, was legal, the court held that because the other count, seeking damages on the equitable ground of improper use of confidential disclosures, sounded in equity, a stay granted pending arbitration must be deemed a stay of an action in equity and hence "merely a step in the control of the litigation" rather than an appealable injunction of an action at law.

The denial of sanctions was clearly an interlocutory order. Although the chief sanction sought was a default judgment, it is settled that the denial of a motion for summary judgment or judgment on the pleadings is not a final judgment appealable under §1291. E.g., *Valdosta Livestock Co. v. Williams* (4 Cir. 1963) 316 F.2d 188; *Waller v. Professional Insurance Corp.* (5 Cir. 1963) 316 F.2d 729; *Spruill v. Cage* (6 Cir. 1958) 262 F.2d 35[illegible], *Hook v. Hook & Ackerman, Inc.* (3 Cir. 1954) 213 F.2d 122, 128. Nor can the denial of a default judgment here be analogized to a refusal of an injunction under §1292(a) (2).[4] The sanctions were sought only against one party, and default judgment against that party alone would not have entitled appellants to the mandatory injunction demanded in their complaint.

Appeal dismissed.

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[4]Cf. *Hood v. Board of Trustees of Sumter County School District No. 2* (4 Cir. 1956) 232 F.2d 626, cert. denied (1956) 352 U.S. 870; *Federal Glass Co. v. Loshin* (2 Cir. 1954) 217 F.2d 936, treating the denial of a plaintiff's motion for summary judgment in an action where he seeks injunctive relief as a refusal of an injunction and appealable under §1292(a)(1). *Contra, Heron v. City & County of Denver, Colorado* (10 Cir. 1963) 317 F.2d 309, 311; *Division 689, Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees of America v. Capital Transit Co.* (D.C. Cir. 1955) 227 F.2d 19; *Morgenstern Chemical Co. v. Schering Corp.* (3 Cir. 1950) 181 F.2d 160.

[Title of Court and Cause]

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the appeal in this Cause be and hereby is dismissed.

[Title of Court and Cause]

ORDER DENYING MOTION FOR SANCTIONS, ETC.

This matter having been argued, briefed and submitted for ruling,

It Is Ordered that plaintiffs' motion for sanctions be, and the same hereby is, Denied. *Smith v. Evening News Assn.*, 371 U.S. 195.

It Is Further Ordered that defendants' motion for a stay of proceedings be, and the same hereby is, Granted. *Andrews, et al., v. Pacific Maritime Association, et al.*, Superior Court of California; *Holderby v. Operating Engineers*, 45 Cal.2d 843.

It Is Further Ordered that the remaining motions submitted by the defendants be stayed pending disposition of the case on arbitration.

Dated, July 19, 1963.

George B. Harris
United States District Judge

Filed July 19, 1963.
Clerk, U.S. District Court.

[Title of Court and Cause]

AMENDED COMPLAINT

Now come plaintiffs and for cause of action allege:

I

That Federal Court jurisdiction is based upon *Section* 301 of the National Labor Relations Act, 29 *USCA* 185 (breach of collective bargaining agreement), 29 *USCA* 1331 (Federal question) and 29 *USCA* 1337 (commerce) and 29 *USCA* 301, et seq. (Welfare and Pension Trust Provisions). The collective bargaining agreement hereunder involved construction and validity of portions under 29 *USCA* 401, et seq., 412 *and* 414 (Labor and Management Disclosure Act), and 29 *USCA* 151 et seq. (National Labor Relations Act).

II

That the defendant ILWU is an unincorporated association and labor union, with its principal place of business in San Francisco, and was at all times and is now an agent for hire and compensated therefor by each of the plaintiffs to represent them as a collective bargaining agent as ship clerks in the Port of San Francisco and said union was and is the exclusive statutory collective bargaining agent under 29 *USCA* 151 et seq. for all ship clerks employed in the Port of San Francisco under the collective bargaining agreement, and a party to said collective bargaining agreement.

III

That the defendants Does One through 20 are fictitious named defendants and their names are unknown to the plaintiffs.

IV

That at all times herein mentioned the Pacific Maritime Association, hereinafter called PMA, was and is an unincorporated association with its principal place of business in San Francisco, California, and conducted and conducts business as such for its members who are employers of ship clerks including ship clerks employed in the Port of San Francisco.

V

That there is a collective bargaining agreement covering the hours, compensation and working conditions and terms of employment of ship clerks on the Pacific Coast, including the Port of San Francisco, and said agreement is in writing and executed by the defendant ILWU as each bargaining representative and agent of the employee ship clerks, and by the defendant PMA on behalf of the employers. That said bargaining agreement is entirely in writing and consists of the following written documents executed as aforesaid, to wit:

1. Master Agreement for Clerks and Checkers and Related Classification, dated 4 April 1952

2. Amendment dated 10 July 1953

3. Supplementary Agreement dated 14 June 1956

4. Vacation Amendment to Pacific Coast Master Agreement for Clerks and Checkers, 1951-3, as Amended

5. Memorandum of Understanding dated 10 August 1959

6. Memorandum for Settlement of ILWU Contract Renewals, dated 3 July 1958

7. Memorandum of Agreement on Mechanization and Modernization dated 18 October 1960 (unsigned)

8. Memorandum of Understanding dated 15 June 1960

9. First Amended ILWU-PMA Pension Agreement dated 28 July 1957

10. Second Amended ILWU-PMA Welfare Agreement dated 28 February 1962

11. Memorandum of Agreement dated June 22 1962. Said bargaining agreement includes said Master Agreement for Clerks and Checkers dated 4 April 1962, that contains the following provisions:

> "*Modification.* The parties realize that from time to time after agreements similar in part to this agreement have been executed, one party thereto will contend that the other party has at some time during the term of agreement orally agreed to amend, modify, change, alter or waive one or more provisions of the agreement, or, that by the action or inaction of such other party, the agreement has been amended, modified, changed or altered in some respect. With this realization in mind and in order to prevent such contention being made by either party hereto, insofar as this agreement is concerned, the parties have agreed and do hereby agree that no provision or term of this agreement may be amended, modified, changed, altered or waived except by a written document executed by the parties hereto."

That said quoted written provision has not been modified and is in full force and effect since its execution in 1952.

VI

That the said bargaining agreement not only provides for the hourly pay but as part of the individual's compensation provides for deferred contingent compensation in the form of moneys paid into trust funds within the provisions of 29 *USCA* 186 *and* 301, et seq. That one of said provisions in said collective bargaining agreement is the payment by the employer to the ILWU-PMA Welfare and Pension Funds for the benefit of all employees in the industry upon each hour of work performed by each ship clerk employed under said agreement including each individual employment of each plaintiff. That as a portion of said contract of employment, there is paid by the employers of each employee, including the plaintiffs, and disbursed by the defendant PMA for its members, annual vacation pay to those on the regular working force who have worked 700 hours or more in the preceding calendar year. That as part of said compensation there is contracted to be paid into the Mechanization Fund under the provisions of the Federal Law applicable to such employees trust funds, 29 *USCA* 186 *and* 301 et seq., the lump sum of $1,500,000 on or about June 15, 1960, and an annual contribution of $5 million, payable in June each year for each of the following 5½ years, which Mechanization Fund is for the purpose of providing death benefits or retirement funds if the employee lives to retirement, and to guar-

antee employment at straight-time pay for 35 hours each week for each person in the permanent working force in the Maritime Industry on the Pacific Coast who was so employed in 1958.

VII

That the ship clerks in the Port of San Francisco are engaged in the flow of interstate and foreign commerce through the Port of San Francisco and are part of the Maritime Industry in said Port.

VIII

That the plaintiffs in this action were and are full time employees and working as ship clerks under the bargaining agreement and the plaintiffs and each of them have worked continuously as such ship clerks in the Port of San Francisco for the past years, as herein set forth, to wit:

Name	Years, Full-Time
Alexander, Fred A.	6
Camarota, Louis P.	6
Cathro, George	12
Dimond, Albert S.	12
Freeman, Lewis	12
Marani, Frank	6
Marvin, Ray C.	10
Newell, James	12
Petersen, Earl D.	9

That each of the plaintiffs worked for said years and each is now available for such work and each is skilled as such ship clerk and a member of the perma-

nent working force of such ship clerks in the Port of San Francisco and each of the plaintiffs was and is dependent chiefly upon said employment as a ship clerk for his livelihood and each was and is available for dispatch on ordinary working days during ordinary working hours from Hiring Halls maintained under said bargaining agreement.

IX

That under said bargaining agreement there was and is created for the Port of San Francisco an unincorporated association and committee, one half of the members of the committee are designated as "employer members" and selected and directed by the defendant PMA, and the other half of said committee are designated as "employee members" and are selected and directed by the defendant Ship Clerks Association, Local 34, ILWU. The said defendant Committee is designated as the Joint Clerks Labor Relations Committee and sometimes referred to in portions of the bargaining agreement as "Checkers Joint Port Labor Relations Committee of San Francisco and Stockton." That defendant Joint Committee in the Port of San Francisco has and does now consist of two members, one selected by and who acts for the PMA and one selected by and who acts for the defendant Local 34, ILWU, and both the employer member's and the employee member's vote is necessary for action by said Committee. That under the said bargaining agreement the said defendant Committee runs and maintains the two Hiring Halls from which

ship clerks are dispatched to the various maritime jobs in the Port of San Francisco area and said defendant Committee under said bargaining agreement has the control of the "registration" lists in said Port making additions and subtractions thereto.

X

That the said bargaining agreement contains provisions that persons employed as ship clerks thereunder who constitute the full-time working force and depend on such work as ship clerks for their livelihood are designated as "registered" ship clerks in said written agreement in contrast and to distinguish them from those who are only seasonal or occasional members of the working force of ship clerks and who depend upon other employment for their principal livelihood and are not permanent full time members of the regular working force. That the master agreement provides:

> "(a) All registration shall be by mutual consent, except that this section shall not deprive either party to the agreement from demanding additions to or subtractions from the registration lists as may be necessary to meet the needs of the port. When objecting to the registration of any man, members of the Joint Port Labor Relations Committee shall be required to give reasons therefor. (b) When it becomes necessary to drop men from the registration list, seniority on the list shall prevail."

Another part of the agreement provides:

> "(a) When it becomes necessary to add men to the registration list, first preference of registra-

tion shall be given to men who now have partial or limited registration and employment in the industry; second preference of registration shall be given to men with previous registration in the industry who were not de-registered for cause; third preference of registration shall be given to men who had partial or limited registration in the industry and who were not de-registered for cause.

(b) Suitable personnel with clerical background or experience in the maritime industry, longshoremen and other workers covered by contracts with the PMA and ILWU shall likewise be accorded preference of registration after the application of the preceding paragraph in registering additional clerks."

That said master agreement also provides:

"(a) Preference of employment and dispatching shall be given to registered clerks who were registered and available for employment in any of the occupations covered by Sec. 2 of this agreement as of 1 June 1951, including registered clerks absent from the industry or inactive because of leave of absence granted by the Joint Port Labor Relations Committee or because of illness or other reasons certified to by the Joint Port Labor Relations Committee.

(b) There shall be no favoritism or discrimination in the hiring or dispatching or employment of any clerk qualified and eligible under the agreement.

* * *

(d) Clerks not on the registration list shall not be dispatched from the hiring hall or employed

by any employer while there is any man on the registered list qualified, ready and willing to do the work."

That the said collective bargaining agreement provides:

"There shall be no discrimination in connection with any action subject to the terms of this agreement either in favor of or against any person, because of membership or non-membership in the union, activity for or against the union or absence thereof, or race, creed, color, national origin or religious or political beliefs."

That the said written agreement by written supplement provides that the master agreement provisions as to registration requires there to be maintained an adequate registered working force of ship clerks.

XI

That the defendant Ship Clerks Association, Local 34, ILWU, is an unincorporated association and union and maintains its principal place of business in San Francisco, California, and the defendant ILWU as both the agent for hire and compensated therefor by the plaintiffs and the exclusive statutory bargaining agent delegated and delegates to the defendant Local 34 ILWU the administration of said collective bargaining agent and representation of all ship clerks under the said collective bargaining agreement for the Port of San Francisco. That the said defendant Local 34 was and is employed as agent for hire and compensated therefor by each of the plaintiffs in all such duties.

XII

That the defendant Union, Local 34, ILWU, selects and directs the employee member of the defendant Joint Committee and said employee member is currently the business agent of said Local 34. That without the vote of said employee member, no person can be or is "registered" as a ship clerk by said defendant Committee. That by said mechanics the said defendant Union, Local 34, ILWU, has prevented the addition of the names of registered ship clerks in the Port of San Francisco, and notwithstanding said provisions as to registration and that the said registration shall provide an adequate working force, the said defendant Union by withholding its approval to individual registration has and does now limit the number of names enrolled as "registered" to approximately one half of the total persons constituting said full time working force of said ship clerks in said Port and to the number needed to constitute said adequate working force. That during the existence of said agreement to the present time, the defendant through its said representation on the said Committee, has and does now arbitrarily restrict its consent involving said fully "registered" ship clerks, solely to applicants therein who are and were at the time of said "registration" full book members of Local 34, ILWU, in violation of said terms of contract and in violation of its said duty as agent for hire and as said statutory collective bargaining agent.

XIII

That the said defendant ILWU and the said defendant Local 34, ILWU, and the employee members

of said defendant Committee has and does now, violate the said provisions of the said contract against discrimination by acts of planned, purposeful and hostile discrimination against the plaintiffs and each of them for the sole reason that the said plaintiffs and each of them were not and are not now full book members of said defendant Unions or either of them, although the plaintiffs and each of them have sought membership therein as full book members and are qualified for such membership and would be members except for the arbitrary refusal of the said Unions and each of them to admit the plaintiffs who have complied with all conditions precedent for such membership.

XIV

That the said defendants ILWU, Local 34, ILWU, and employee members of the defendant Committee have breached the said collective bargaining agreement by failure to enter upon the Committee's list of "registered" ship clerks in the Port of San Francisco the plaintiffs and each of them and by failure to dispatch the plaintiffs without discrimination, under the terms of said collective bargaining agreement and by failure to maintain the list of ship clerks at an adequate number as in the contract provided. That the said defendant Committee has breached said collective bargaining agreement by failure to register an adequate number notwithstanding demands by the employers for an adequate registered "registration" of ship clerks in said port. That said breaches of said contract were done to grant preference to those ship clerks who are full book members of said Local 34.

XV

That prior to the said Master Agreement on 4 April, 1952, the bargaining agreement in effect on June 1, 1951, and prior thereto, was a certain written bargaining agreement known as the Pacific Coast Longshore Agreement dated 6 December, 1948, and supplemented by the Ship Clerks and Checkers Agreement of January 17, March 11 and March 25, 1949, and that by its terms said prior written collective bargaining agreement gave preference of registration and employment to said Local 34 union membership. That as a result thereof only union members were fully "registered" as ship clerks on June 1, 1951, and all such "registered" ship clerks were defendant Local 34, ILWU union members. That the said prior written collective bargaining agreement in effect on June 1, 1951, as aforesaid, was determined illegal and void in proceedings involving the defendant ILWU and Local 34, ILWU, in 90 *NLRB* 1021, 98 *NLRB* 284 and the adjudication of the 9th Circuit Court of Appeals, in 211 *Fed.* 2d. 946, by reason of said preference of employment and registration. That said adjudicated illegal provisions in effect on June 1, 1951, are blanketed in and carried into the current bargaining agreement by a seniority date granting preference of employment and dispatch for those registered on June 1, 1951, under said illegal and void provisions of said prior agreement. That the illegal provisions of said agreement are blanketed in and carried into the current agreement by the defendant Joint Committee keeping in effect the "registrations" made under said prior illegal agreement, and by the arbitrary re-

fusal of said Union, Local 34, ILWU, by its said employee representation on the defendant Committee to approve sufficient "registrations" additions to include a force sufficient to perform said ship clerk work in said Port, with the intention thereby to give preference and unlawful priority in violation of said contract. That by keeping the said "registrations" to approximately one half of the said full time working force dispatched from day to day from said Hiring Halls, the "registered" members which are co-extensive with the said defendant Local 34 union full book membership, are dispatched from time to time from the Hiring Halls and given priority of dispatch and employment and as a consequence obtained and now obtain the better, the more sought-after, and the far more profitable employment as said ship clerks. That the additions to said fully "registered" list of ship clerks in the Port of San Francisco have been and are now, by said mechanics, limited solely to said Local 34, ILWU, full book union membership. That the giving of the uncontrolled discretion to the said defendant Union, through said employee member of said defendant Joint Committee in "consent" to registration of ship clerks, by requiring "mutual consent" of both said employer and employee members to each individual "registered" is illegal and void.

XVI

That within the four years last passed on numerous occasions, and on or about June 26, 1962, each of the plaintiffs duly and regularly requested that he be duly "registered" as a ship clerk by the defendant

Committee and enrolled on its records under said bargaining agreement, but the said defendant Committee has and does now wrongfully refuse, neglect and fail without just cause or excuse to enroll the plaintiffs or any of them as "registered" ship clerks, but has and does now register others who join the working force of ship clerks subsequent to the plaintiffs in violation of said agreement. That the plaintiffs Albert S. Dimond, Lewis Freeman and James Newell were at one time duly "registered" in the Maritime Industry and were deregistered without cause and without notice by the said defendant Union arbitrarily removing their names from said list of "registration," probably for want of union membership in defendant Local 34. That each of the plaintiffs is entitled to "registration" and preference therefor under the said contract which was and is violated by the said defendant Committee and its failure to follow said contract provision That the said defendant Committee has and does now fail, refuse and neglect to make the ministerial act of entering each of the plaintiff's names in said "registration" list of full time ship clerks employed in the Port of San Francisco to designate each as a member of the permanent working force as provided in said contract. At no time when such applications for "registration" or request was made by the plaintiffs therefor did the Joint Committee or either of its members ever state, to the plaintiffs or any of them, or otherwise, any grounds or reasons or any objection to any of the plaintiffs' registration as provided in the contract, and did thereby breach said contract.

XVII

That each of the plaintiffs is a party to said collective bargaining agreement, and said contract was made for the benefit of each. That the said collective bargaining agreement is incorporated in and made a part of each plaintiff's employment on each individual dispatch and as such ship clerk. That each plaintiff has duly and regularly contributed his portion of the maintenance of the said Hiring Halls as provided in the contract. That as a part of the contract of hire of said defendant Unions, the plaintiffs and each of them have duly and regularly paid and contributed assessments for caucuses and representations to the said defendant ILWU, and to the defendant Ship Clerks Association, Local 34, ILWU, and said contribution for maintenance of hiring hall assessments and other payments to the said Unions including said representation and caucus assessments is identical with and varies from month to month, with the full book members' dues and assessments of such full book members of Local 34, ILWU.

XVIII

That in addition to the so called "preferred" employees employed on a monthly basis who for the most part are supervisory employees in the Maritime Industry, and who are full book members of Local 34, ILWU, there are approximately 450 men who constitute the full time working force of ship clerks in the Port of San Francisco available for and normally dis-

patched from day to day from the two hiring halls in the Port of San Francisco under said collective bargaining agreement. That approximately 235 of said 450 men are "registered" and are also full book members of said Local 34 and approximately 215 of said permanent working force, or about 48% thereof, including the plaintiffs, are nonetheless full time employees, and members of the permanent working force but are arbitrarily discriminated against and are not "registered" nor are they such full book union members. That the said defendant ILWU, Local 34, has determined that there is and has existed a necessity for a substantial increase in the number of "registered" ship clerks in the Port of San Francisco, but for the purpose of maintaining its full book members and as a part of said planned, purposeful and hostile discrimination against the plaintiffs, both as said statutory bargaining agent and as agent for hire in violation of its contractual duty as such agent for hire, has and does now violate said contract by both refusing to follow the terms of the said contract as to registration and the preferences therefor and also to maintain an adequate working force as provided in said written agreement.

And for a Second and Separate Cause of Action for Declaratory Relief, Plaintiffs Allege:

I

Plaintiffs reallege paragraphs I through XVIII of their first cause of action.

II

That the plaintiffs have been and are now informed by the various shipping companies and stevedoring companies as individual employers, to which plaintiffs have been and are now being dispatched from time to time by the hiring halls as ship clerks, that such employers who are members of the defendant PMA pay the full compensation provided by the collective bargaining agreement on each of the plaintiff's employments to the said PMA including the wages under the so called "8 hour rule," the welfare and pension payments generated and computed on an hourly basis on each of the plaintiff's services as such ship clerks, and the payment to the said Mechanization Fund by each of said employers upon each of the plaintiff's work and the vacation pay under said collective bargaining agreement on each said hour of work by each of the plaintiffs in such individual employment. That the said defendant PMA does not pay plaintiffs according to said collective bargaining agreement, but on the contrary the said PMA pays the full book members of Local 34 according to said contract, but does not pay the plaintiffs or any of them from such compensation remitted by employers, for their work in the event the hold or ship is loaded or the plaintiff's individual dispatch is terminated prior to eight hours, in accordance to the "eight hour rule" wherein a ship clerk is paid for eight hours of work if he works on any single day more than four hours but less than eight hours. The plaintiffs' coun-

sel is informed by counsel for the defendant PMA that the said welfare and pension fund contributions are immediately remitted by the said PMA to the trustees for said fund including the moneys contributed by the plaintiff's individual employers. That the said defendant PMA does not pay any portion of the vacation pay or of the said Mechanization Fund to the plaintiffs or for their use, or benefit.

III

That the defendants H. J. Bodine, L. B. Thomas, William Chester, K. F. Saysette, J. A. Robertson and Hubert Brown are the Trustees of the ILWU-PMA Welfare & Pension Funds. That the said collective bargaining agreement until February 20, 1962, provided that said Welfare and Pension Fund was used for and the benefits thereof extended to all persons working under said collective bargaining agreement including the plaintiffs. That under said Trust and the terms thereof, and under the said collective bargaining agreement the Fund is for:

(a) the purchase of contracts of insurance for each employee including plaintiffs;

(b) to pay group medical, surgical and hospital benefits under contracts with the Kaiser-Permanente Health Plan for the said employees including the plaintiffs, and their immediate family, and for dental benefits for dependent children of such beneficiaries and for supplementary maternity benefits for such beneficiaries under said surgical, medical and hospital coverage contract.

That said payments were duly made and such benefits furnished the plaintiffs and each of them until 1958, when the said defendant Trustees breached the said contract and thereafter failed, refused and neglected to purchase either said insurance contracts or group hospital, medical and surgical and other benefits for the plaintiffs or any of their dependents. That on February 28, 1962, the said defendant ILWU in violation of its said duty as such agent for hire for the plaintiffs and as exclusive collective bargaining agent for all ship clerks including the plaintiffs, agreed with the defendant PMA, who well knew of said violation of said duty of the said defendant ILWU, to amend said welfare and pension fund portion of the collective bargaining agreement retroactively to June 1, 1961, so that only an arbitrary portion, to wit 52% of the said ship clerks who were full book members of the Local 34, and only such full book union members, would receive all of the benefits from said trust. In violation of the said Federal Statutes applicable to such welfare and pension funds, the said defendant fund Trustees have and do now use said funds including the compensation generated upon the plaintiff's services from their individual employers, so paid through PMA as aforesaid, for only the said 52% of ship clerks who are said full book members of Local 34, and not for all employees under said fund or in said working force.

IV

That the defendants Harry Bridges, H. J. Bodine, L. B. Thomas, K. F. Saysette, R. J. Pfeiffer and Capt. C. Pryor are Trustees of said Mechanization

Fund. That in violation of the express terms of said written agreement, there have been created for the purpose of violating said contract two so called "funds" consisting of said defendants designated as trustees of "Vesting Benefit Fund" and said defendants as trustees of "Supplemental Wage Benefit Fund" an unfunded trust. That in violation of the said contract the said PMA disburses directly to only 410 individuals, nevertheless defendant trustees stating in their report to the Department of Labor that there are 1,390 more who will be eligible but are not currently receiving benefits, and such funds are disbursed in the name of the said Trustees from their accounting offices at 16 California Street, San Francisco, to said unknown 410 beneficiaries. That the said defendant PMA has disbursed in said defendant Trustees' name and in violation of the contract during the year 1960 the sum of $3,000, during the year 1961 the sum of $7,521.40 and during the calendar year 1962 the sum of $814,870.00 in the name of said Trustees as disbursements under said "Vesting Benefit Trust Fund" as an "unfunded plan." That the said defendant PMA has disbursed to the said Trustees who purport to hold under "Supplemental Wage Benefit Trust Fund," in the year 1960, $784,500.00, in the year 1961, $1,786,341.20, and in the calendar year 1962 the sum of $534,191.00. That no part of said "Supplemental Wage Benefit Trust Fund" has been or is now being disbursed or paid to any person and in violation of the collective bargaining contract defendants Trustees have not paid plaintiffs any part though plain-

tiffs have not, by reason of the other breaches of the contract herein set forth, had the 35 hour minimum work and are entitled to benefits thereto for some months prior to this action. That the balance of the $11,500,000.00 Mechanization Fund payable to and including June 1962 is held:

(a) by the defendant Welfare Fund Trustees in the sum of $3,670,926.00, in contravention of said agreement, but for the purposes of said Mechanization Fund under said October 18, 1960, Supplement Agreement;

(b) by the defendant PMA, in the sum of $3,040,170.00 unpaid in contravention and in breach of said agreement, but nevertheless collected under said collective bargaining agreement from its members for work performed by the plaintiffs and others in the Maritime Industry, and said sum is held by said defendant PMA in contravention of and in violation of both said contract and of the Federal Statute applicable to such Welfare Funds.

That the said Mechanization Agreement Supplement dated October 18, 1960, provides for the payment of said $1,500,000.00 payable by the employers in 1960 and $5 million per year payable in each year subsequent thereto, for a period of five and a half years, as aforesaid, and provides that said Funds shall be used solely for the benefit of the full time working force in the Maritime Industry including ship clerks

employed in 1958, of which each of the plaintiffs is part, for the purpose of guaranteeing full time employment at straight pay to all of said group and to provide death benefits of approximately $5,000 or of voluntary retirement benefits of approximately $7,950.00 upon retirement. That the said defendant ILWU in violation of its said duty as said agent for hire and compensated by the plaintiffs, and as said exclusive collective bargaining agent of all ship clerks, both union and non-union, and with full knowledge of the said defendant PMA of said employment and said duty of ILWU, made as a part of said agreement of October 18, 1960, a provision that said benefits would not be used for all employees employed in 1958, but would be arbitrarily restricted to those employees designated as "registered" and thereby excluded all benefits from the plaintiffs and other non-union employees who are arbitrarily not so "registered" by the defendant Committee. That said restriction is in violation of the Federal Statutes applicable to such funds.

V

That by the said mechanics and practice of the said defendant Joint Labor Relations Committee and said defendant Unions violated and breached said collective bargaining agreement as follows:

1. By discriminating against the plaintiffs and others who were and are non-union employees in both registration and dispatch in violation of the specific terms of the contract therein provided against such discrimination.

2. By failure to maintain the number of registered at an adequate number to provide an adequate working force of ship clerks in the Port of San Francisco on such registered list, in order to give preference to said full book members of said defendant Local 34.

3. By making "registered" coextensive with said defendant ILWU, Local 34, full book membership.

4. By failure to meet the demands of the employers for an adequate registered working force.

5. By giving priority of dispatch to those who are full book members of Local 34 in violation of the terms of the contract.

6. By limiting the selection of the employee member of said defendant Committee solely to votes of those who were full book union members and permitting only such full book members of Local 34 to vote and select such representative through the said Union.

7. By restricting the election of the dispatchers who actually hand out the individual jobs in each of the hiring halls on each dispatch, to dispatchers elected solely by an arbitrary group limited to those who are full book members of Local 34, and not permitting the plaintiffs and others who are not full book members to vote for or take part in the selection and election of such dispatchers.

8. By keeping in effect the "registration" of ship clerks who were "registered" under the said illegal provisions of the prior contract so held illegal as to

such union membership preference of registration and employment.

9. By violating the said contract and by not following the provisions as to preference and priority and the provisions as to registration, the said defendants grant an unlawful preference in dispatch and employment to those having this arbitrary and unlawful preference, and in addition said defendants do not dispatch equally and without discrimination all those qualified and eligible under the said contract including the plaintiffs.

VI

That the said ILWU in violation of its said duty as an agent for hire and compensation paid by the plaintiff, and its duty as said exclusive collective bargaining agent to act impartially for all employees, and with the cognizance and knowledge of the defendant PMA of said defendant's said violation of its said duties provided and now provides in said collective bargaining agreement that all matters of arbitration and mechanics for handling of grievances in connection with registration or dispatch, and all other matters are denied and prevented the plaintiffs and each of them who are not "registered" as ship clerks by said defendant Committee. That on or about June 26, 1962, each of the plaintiffs, through their counsel, wrote each of the defendants and in writing requested that if they or any of them knew of any mechanics or arbitration or terms in the collective bargaining agreement as to arbitration covering any of the matters in dispute, that the plaintiffs would welcome the

mechanics of arbitration to solve these disputes or any phase of them. That the said defendants and each of them refused to reply to said communication, the plaintiffs filed this action on August 13, 1962.

VII

That there is a justiciable controversy between these plaintiffs and each of them and the said defendant PMA, defendant ILWU, defendant Ship Clerks Association, Local 34, ILWU, defendants, Trustees of the Welfare and Pension Funds, and the defendant Trustees of the Mechanization Fund and each of them concerning the terms of employment, dispatch, compensation, and the said collective bargaining agreement, and the rights and duties thereunder and arising from the breach of said contract as follows:

1. The plaintiffs and each of them contend that said bargaining agreement consists solely of the written documents aforesaid. On the contrary, the defendants and each of them contend that the bargaining agreement is subject to and is changed and added to by secret oral understandings between the defendants ILWU and PMA, and that it is not confined to the said written memorials constituting the said bargaining agreement, and that the defendants and each of them by their continued breaches have waived the said provisions of the contract, not only as to the matters which the plaintiffs and their individual employers relied upon as the disclosed and known collective bargaining agreement in each dispatch, but as to all matters so breached by said defendants' unlawful con-

duct. In this respect it is the plaintiffs' contention that the provisions of the contract requiring it to be changed only by writing, is a demand sufficient under the Labor Management Relations Act to require any change to be reduced to writing; and that the *Landrum Griffith Act* requires the entire collective bargaining agreement to be in writing so that it may be inspected and known by the employees including the plaintiffs, otherwise the provisions of Congress in said Act are meaningless.

2. The plaintiffs contend that each of them under said collective bargaining agreement as members of the permanent full time labor force of ship clerks available for dispatch from the hiring halls in the Port of San Francisco, were and are entitled to the so called status of "registration" as provided in the bargaining agreement and that a failure to enter their names on such "registration" list is a breach of the contract. The plaintiffs contend that discrimination against them as non-union ship clerks is a violation of the collective bargaining agreement. Plaintiffs contend that in making "registration" the defendant Committee must follow the priorities therefor in said agreement, and failure to do so is a breach of contract. Plaintiffs contend that the collective bargaining agreement requires an adequate number of "registered" ship clerks and the failure to do so is a breach of contract. Plaintiffs contend that upon demand of the employers to an increase in the number of ship clerks in the Port, a failure to increase such number is a violation of said contract. On the other hand the de-

fendants and each of them contend that there are two classes of employees: those whom the defendant Committee designates as "registered" and who constitute approximately one half of those in the permanent working force dispatched from the two hiring halls and who, by said mechanics and practices, receive special favors and preferences and who receive greater compensation whereas plaintiffs and others are subject to discrimination and are compensated at a lesser rate.

3. The plaintiffs contend that the current collective bargaining agreement is invalid insofar as it blankets in and perpetuates the "registration" in effect on 1 June 1951 made under the illegal provisions of the prior bargaining agreement that gave preference of employment and registration to union members, and said prior agreement provisions giving such priority to union membership was held invalid in the proceedings involving the defendant unions in 90 *NLRB* 102, 98 *NLRB* 284, and adjudicated by the Ninth Circuit, United States Court of Appeals, in 211 *Fed.* 2d 946 as void and illegal by reason of said preferences in employment and registry to said union membership. On the contrary, the defendants and each of them contend that said provisions in the current bargaining agreement granting preferences of employment and dispatch to those "registered" as of 1 June 1951, notwithstanding said adjudication, is valid and binding and "registrations" made under said illegal provisions of said prior agreement confined to said union membership, remain in full force and effect.

4. The plaintiffs contend that they and each of them are entitled to equal dispatch from said hiring halls under the valid terms of the bargaining agreement, without discrimination and equally under the terms of said agreement, and that the plaintiffs and each of them are and were during each of the years they have been and are full time members of the ship clerk working force, qualified and eligible under the said collective bargaining agreement as such ship clerks and they were and are dispatched thereunder and entitled by the specific terms of said agreement to dispatch without favoritism or discrimination in any hiring or dispatching or employment as such ship clerks. Plaintiffs contend that they and each of them are entitled to equal treatment without discrimination by reason of lack of union membership by the express provisions of the collective bargaining agreement. On the other hand, the defendants and each of them contend that said hiring halls and their facilities, and the provisions of the said collective bargaining agreement shall be and are used to grant preference to those whom the Committee arbitrarily enters on its list as "registered" irrespective of the requirement of preference of registration or the said agreement's provisions as to registration. In this respect the said defendant Joint Port Committee, ILWU, Local 34, and PMA contend that the agreement requires and authorizes them to dispatch ship clerks to jobs in the following order of preference for dispatch and employment:

(a) fully "registered" (Class A) ship clerks "registered on 1 June 1951 under the prior invalid

agreement granting preference of employment and dispatch to Local 34 full book members.

(b) fully "registered" (Class A) ship clerks "registered" since 1 June 1951, whether under the prior invalid agreement, or under the present collective bargaining agreement.

(c) other "registered" ship clerks (designated by the defendant Committee as "Class B").

(d) longshoremen, members of Local 10, ILWU, who have not on that date either been dispatched from the local longshore hiring hall, or who did not choose to be dispatched as longshoremen, and who are physically present in the clerks' hiring hall.

(e) such other persons, whether experienced or not, as the dispatcher elected as aforesaid, may, for reasons personal to the individual dispatcher, choose to dispatch as ship clerks, even though members of the full time working force of ship clerks, experienced as such, are available for dispatch in the said hiring hall, including plaintiffs.

5. Plaintiffs contend that they, as parties employing and compensating such agents, the defendants ILWU and defendant Local 34, ILWU, and as non-union ship clerks represented by the said defendants as the exclusive agent therefor under the *Taft-Hartley Act*, are entitled to be represented in such bargaining agreement negotiations and in the administration of the said collective bargaining agreement, without discrimination, and faithfully and equally, according

to the laws applicable to agents for compensation for hire, and according to the rules applicable to statutory collective bargaining agents, and that any abuse of said fiduciary position or relationship to obtain preference for any group or class of employees, or any planned, hostile, and purposeful discrimination, against the plaintiffs as such principals under a contract for hire, or as either employees or non-union employees is improper and that the plaintiffs are entitled not only to their action at law for breach of this duty, but that equity will and must protect the plaintiffs in the construction and enforcement of said collective bargaining agreement from such abuse from such acts by said defendants. That when the PMA deals with said union in the making, changing, and in the administration of the said collective bargaining agreement, it well knows that said defendants Unions are both agents for hire compensated by the plaintiffs and the employees' exclusive collective bargaining agent and that the authority of such agents are limited accordingly, and any contract it makes it makes with such knowledge and any transaction it makes in the administration of such collective bargaining agreement, it does with such knowledge of said agents' limitation of authority. On the other hand, the defendants and each of them contend that their actions, though they grant unconscionable and unlawful preferences by said mechanics in dispatch and preference of jobs from said hiring hall, and in compensation for work performed thereunder, and their actions permit the selection and election of employee members of the said defendant Joint Commit-

tee and of hiring hall dispatchers by only approximately half of said working force, and prevent the use of arbitration or grievance machinery in all matters involving the plaintiffs, is nevertheless valid, and that the plaintiffs and none of them have any right in equity or in law to demand that the ILWU perform its duties as an agent for hire compensated by the plaintiffs or as the exclusive statutory collective bargaining agent under the *Taft-Hartley Act,* and these not affect the acts done by said agents under said fiduciary duty.

6. The plaintiffs contend that they are entitled to the contract pay and compensation as ship clerks, as all others working under the collective bargaining agreement, whether or not the said defendant Committee has made the actual act of entering the plaintiff's name as "registered" in said Committee's lists and in particular the right to be paid according to the bargaining agreement for eight hours in the event their employment in any one day is less than eight hours, as in the agreement provided; that the plaintiffs and each of them have the same benefits under the Welfare and Pension Fund as all other ship clerks and that the attempted retroactive change in said agreement is void and under federal law applicable to such funds such benefits cannot be restricted by any mechanics solely to those having full book membership in the Local 34 and all of the benefits including the wages generated on the plaintiff's individual employment and paid to the fund cannot be used exclusively for such union members; that the sums and

benefits accrued until the attempted change in February 1962 are benefits to which the plaintiffs and each of them are entitled by the express terms of the collective bargaining agreement; that the Mechanization Fund moneys are consideration for contracts made by and for benefit of plaintiffs and all other employees and moneys generated upon the employment of the plaintiffs and all other employees and that plaintiffs, together with all said employees, are entitled to their equitable interest in the said funds and to the benefits thereunder and that said benefits cannot be restricted in violation of Federal Statute solely to employee union members; that the plaintiffs and each of them are entitled to said vacation pay under said collective bargaining agreement, each of them having for the years involved worked the necessary hours under the joint collective bargaining agreement therefor. On the contrary, the defendants and each of them contend that the said plaintiffs solely because the said defendant Committee has not entered the plaintiffs' respective names on the list of "registered" ship clerks, but has only entered as "registered" clerks as an arbitrary part of the working force restricted to those who are full book union members, the plaintiffs are not entitled to any of the deferred contingent or other benefits to be paid under the collective bargaining agreement, but the PMA may and does keep for itself any funds from the individual employers for compensation of plaintiffs paid to it, including funds for deferred contingent and other benefits and vacation pay and Mechanization Fund payments and

the defendant Trustees of the Welfare and Pension Fund can and does properly refuse to pay for or provide any benefits to the plaintiffs under the terms of the collective bargaining contract because they are not union and "registered" members, and said defendant Trustees of said Fund contend that they properly use said funds only for union members to the exclusion of all other employees upon whose work said funds therefor are generated, earned and paid, including plaintiffs.

7. The plaintiffs contend that there should be no discrimination by reason of age between the ages of 40 and 64 as provided by 1961 *Statutes of California,* Chapter 1623. On the contrary the defendants and each of them contend that in "registration" and in making up the lists of regular working force of ship clerks dispatched with preference as to jobs and priority of dispatch from the hiring hall, said defendants not only can and do consider the age of such of the plaintiffs as are 50-64 years of age, and disqualify them solely for said reason of age, but nevertheless defendants take such other persons who are acceptable to said defendant Local 34 and accepted into full book membership of defendant Local 34, and not disqualify them for age, although some are between said ages of 50 and 64.

VIII

That the said Mechanization Agreement Supplement, has and does now reduce the amount of work available for those in the Maritime Industry in the

Port of San Francisco, and also as a result of said discriminatory practices against the plaintiffs in violation of the contract, and the said improper constructions of the said bargaining agreement, since the fall of 1961, the plaintiffs and each of them are now being dispatched only occasionally as such ship clerks from the said hiring halls.

And for a Third and Separate Cause of Action for Recovery Ancilliary to and a Part of the Action for Breach of Contract and for Declaratory Relief Upon the Collective Bargaining Agreement, the Plaintiffs Allege:

I

Plaintiffs reallege paragraphs I through XVIII of their first cause of action and paragraphs II through VIII of their second cause of action.

II

Plaintiffs are informed, believe and therefore allege that during the years the plaintiffs and each of them have been and now are employed as ship clerks under the collective bargaining agreement, the various shipping companies and stevedoring companies, members of the defendant PMA, in the Port of San Francisco employing the plaintiffs, have been and now are paying to the defendant PMA the entire compensation for such work of each of the plaintiffs in accordance with the said collective bargaining agreement, including all fringe benefits (deferred contingent compensation) that are payable under said con-

tract and are paid to all other ship clerks. That the said funds were and are paid to the said PMA, under said collective bargaining agreement, for the use and benefit of the individual plaintiffs. The PMA has only paid and disbursed portions to the plaintiffs as hereinabove alleged, or for the use of the plaintiffs. The plaintiffs believe and therefore allege that this money must be somewhere, and the plaintiffs seek to impress a trust upon said funds for their use and benefit under the terms and conditions and the purposes for which it was paid under said collective bargaining agreement. That a demand therefore has been made upon the various defendants for an accounting thereof and the said defendants have and do now refuse and neglect and fail to account for said funds or any part thereof or to use the same in accordance with the collective bargaining agreement for the said purposes for which it was paid, or to pay the plaintiffs' compensation according to the collective bargaining agreement for services performed by the plaintiffs under said collective bargaining agreement.

III

That within four years last past, immediately preceding the filing of this complaint, the plaintiffs and each of them by reason of the said breaches of the said contract and by reason of the failure to equally dispatch and employ the plaintiffs to equal jobs, under said bargaining agreement and according to the terms thereof, each plaintiff has been damaged in the sum of approximately $5,000 in each of said years, by rea-

son of the said loss of earnings therefrom. That the plaintiff prays leave to amend this complaint and set forth with certainty the amount of damage for each plaintiff when the same shall have been ascertained upon discovery.

And for a Fourth Cause of Action for Declaratory Relief, Plaintiffs Allege:

I

Reincorporate paragraphs I through XVIII of the first cause of action and paragraphs II through VI of the second cause of action.

II

That the use of "registration" of employees is novel to the Maritime Industry and was used originally to designate those employees in the Industry who were full time employees and dependent thereon for their livelihood from those who were only seasonal or part time employees in the Industry and dependent upon other employment during part of each year for their livelihood and is by the provisions of said current written agreement for said designation. That under the said prior contracts preference of employment, dispatch and registration were given to said union membership by reason of express provision therein. That on April 6, 1951, the examiner in a proceeding before the NLRB made an Interim Report holding that the execution of the said written collective bargaining agreement was in itself an unfair labor practice because of said union membership preference.

That immediately and as a result thereof the defendant PMA and defendant ILWU renegotiated the said basic contract providing for said priority of employment and dispatch to those "registered" as of June 1, 1951, under said illegal provision for priority of registration to Union members in order to defeat and avoid said determination of said NLRB. That on February 26, 1952, said NLRB on the basis of said proceedings involving said Interim Report, directly determined that the execution of said written collective bargaining agreement granting said preference to Union members was per se an unfair labor practice. That thereupon the defendant ILWU and the defendant PMA, to defeat and make void said determination of said NLRB renegotiated said clerks collective bargaining agreement and on April 4, 1952, executed said Master Agreement for Clerks and Checkers providing for said seniority date of 1 June, 1951. That thereafter on June 6, 1954, said NLRB proceedings were reviewed by the U.S. Court of Appeals, Ninth Circuit, and the said original collective bargaining agreement and its said provisions as to priority of registration, employment and dispatch for union members was adjudicated illegal and void. That for the purpose of frustrating and avoiding said two NLRB orders and said U.S. Court of Oppeals, Ninth Circuit, decision of 211 Fed. 2d 946 of April 6, 1954, the said Master Agreement containing both said seniority date of June 1, 1951, and said "registration" provision requiring said joint consent (arbitrary veto by the union through its selected and directed employee member) and denial of all arbitration and grievance machinery

to "non-union non-registered" ship clerks have been not only continued but extended and kept in effect and was extended for a term of years and kept in effect well knowing its said purpose as late as June 29, 1962.

III

That although said collective bargaining agreement contains said express provisions against discrimination because of lack of union membership, the defendant PMA and defendant ILWU and defendant Local 34, ILWU, defendant Committee and defendant Trustees of said Funds at the time of commencing this action and do now at the time of this amendment use said designation of "registration" not only to defeat said NLRB orders and said adjudication by confining the "registered" ship clerks in the Port of San Francisco solely to such full book members of defendant Local 34, ILWU, and making the two co-extensive and synonymous terms and also to discriminate against the plaintiffs and all other full time members (not union members) of the working force of ship clerks in the Port of San Francisco in order to grant preference to said union members not only in dispatch and employment, but also to use their earnings in the Welfare and Pension Fund solely for full book members of said union and also to permit said defendant PMA to unlawfully divert to itself the vacation pay and parts of the Mechanization Fund and part of the hourly pay under the said "eight hour rule" of all non-union ship clerks in the Port of San Francisco in violation of said collective bargaining agreement.

That to effect this unlawful design and contract violations said defendants by their said actions and conspiracy have done the following:

1) Maintained on the "registered" list of said defendant Committee all union members "registered" under said prior illegal contract provisions.

2) Kept the "registered" number of ship clerks in the Port of San Francisco at said artificially low number to grant said preference of employment and dispatch and confine benefits under said jointly trusteed plans to said union members.

3) Breached the said written contract provisions as to said welfare and pension benefits from 1958 to February 1962, when said defendant PMA and defendant ILWU purported to amend said agreement retroactively to June 1, 1961, to confine all benefits to solely said union members by limiting it to "registered" ship clerks.

4) Admit to "registration", ship clerks in said Port only those who are full book members in said defendant Local 34, ILWU, and said defendant Union by its said employee member limited its "consent" and vetoed all others such "registration", and not followed the priority of registration nor adequate number of ship clerks in violation of said agreement.

5) Said defendant Local 34, ILWU, collected compensation monthly as a "permit" to work under said collective bargaining agreement from all non-union ship clerks both for itself and defendant ILWU including monthly charges itemized for "representation

and caucuses" in connection with said collective bargaining agreement which said monthly compensation was identical in amount with dues and assessments of its full book members.

6) Confine election of the Union official acting as said "employee member" of defendant Committee solely to its said membership including said supervisory employees and retired union members not dispatched from day to day from said hall and excludes plaintiffs and all other full time members of said ship clerk working force in said Port who were not accepted into Union full book membership from such vote.

7) Confine election of hiring hall dispatchers who give out actual jobs, to vote of such full book union members including supervisory employees and retired union members who are not dispatched from day to day from said hiring halls and exclude plaintiffs and all other members of the ship clerks' full time working force not admitted to such membership from such vote.

8) Exclude from all mechanics of grievance and from arbitration under said collective bargaining agreement all matters by non-Union "non-registered" ship clerks, including plaintiffs, so their only remedy is by judicial proceedings and when plaintiffs seek this judicial determination, to discriminate even further against plaintiffs therefor.

9) Dispatch to all jobs in preference, and demand employers retain on employment as priority, all full

book Union members who choose to work and thus give priority not only of dispatch but employment to said Union members including jobs with higher pay, overtime and/or penalty pay.

10) Permit and assist defendant PMA to discriminate between said Union and non-Union members, not only in such employment by its members, but in disbursing compensation for work paid PMA by individual employers and to permit PMA to profit by its said discrimination and contract breaches and PMA does the following:

a) Although plaintiffs and other non-Union ship clerk members of the said permanent working force do the same work, under the same contract provisions therefor, it pays plaintiffs and other said non-Union ship clerks for actual hours (and not under said "eight hour rule") and no fringe benefits, though money therefor is paid PMA by individual employers to pay said employees according to the terms of said collective bargaining agreement.

b) Pays said Union members as provided in said agreement.

c) That non-Union members (when dispatched, without the said current discrimination against plaintiffs for seeking judicial remedy, as are other non-Union ship clerks) earn between $4,000 and $5,000 per year working ordinary business days during ordinary business hours (not overtime, or evenings or where there is additional or higher

pay) and receive no part of the vacation pay, welfare and pension benefits nor Mechanization Fund payments. On the other hand said Union members receive about $5,000 per year more, plus two weeks at straight pay, or more, as vacation pay, plus all the Welfare and Pension Fund benefits and some unknown 410 of the said Industry receive from PMA payments for Mechanization Fund benefits, though some 1,390 more are entitled thereto and said Union members will as beneficiaries receive said multi-million dollar fund, unless judicial remedy therefor intervenes.

IV

That there is a justiciable controversy between the parties hereto in which plaintiffs contend there is a clear violation of the terms of said collective bargaining agreement:

1) Plaintiffs contend the provisions of said agreement as to non-discrimination both in the portion as to Union and non-Union and the portion as to dispatch of those qualified and eligible under said agreement is valid and takes precedence over any provisions as to "registration" when so used by defendants, as to "mutual consent" thereto which is illegal and as to the seniority date of 1 June 1951 (which is illegal), and denial of grievance machinery to "non-registered non-union" ship clerks is invalid.

2) That the term "registration" has by said joint acts of said defendants become co-extensive with and synonymous with full book union membership in said

defendant Local 34, ILWU, and is thus invalid and void and has been and is now used as an instrument of discrimination in violation of said collective bargaining agreement.

On the other hand said defendant PMA, defendant ILWU, defendant ILWU, Local 34, defendant Committee and defendant Trustees contend that the full time working force of ship clerks is confined solely to "registered" ship clerks, co-extensive with said union full book membership, and all others are permitted to and do work solely at the sufferance of said defendant Unions, upon payment of said monthly "permit" payment, and all priority of dispatch and employment are reserved to and for said full book Union members by designation as "registered" that by the said mechanics all fringe benefits (deferred contingent compensation) can be and are denied non-Union ship clerks of the full time working force by use of said designation of "registration" and said compensation for services can be and is used in part solely for said full book union members or taken by PMA from the purpose for which it was paid by individual employers, under said collective bargaining agreement, to pay plaintiffs and other non-union ship clerk employees. Said defendants contend that no matter how long any ship clerk works or what skill or ability he has, or how often he is available for dispatch or however much he works as such, that unless and until the defendant Union, Local 34, ILWU, gives its approval necessary for "registration" (and which is confined to its full book members) such ship clerk

is not and cannot be a member of said "full time working force"; and that said defendant Union, Local 34, ILWU, and consequently the defendant Committee, cannot enter such ship clerk's name as "registered" nor may such ship clerk receive any benefits from either said Trustees' Funds nor need the defendant PMA pay such ship clerk from funds paid it by the individual employer under said agreement to pay such ship clerk, but may retain all wages under said "eight hour rule", all vacation pay, and such part of said Mechanization Fund payment generated on said ship clerks' wages as it, the said PMA, chooses not to disburse.

V

That said defendants cannot misuse the provisions of "registration" of ship clerks in the Port of San Francisco, in said collective bargaining agreement, as a subterfuge or a means to discriminate against all non-union ship clerks in said Port, including plaintiffs, and to defeat, frustrate and avoid said NLRB orders and decisions, the adjudication of said U.S. Court of Appeals, Ninth Circuit, or said Federal Statutes involving interstate commerce. That there must be an adjudication in these proceedings as to such misuse of the said "registration" provisions and breach thereof by said defendants and the rights, duties and liabilities of the plaintiffs and said defendants thereunder and the legality or illegality of said agreement's provisions and of said equitable interests of plaintiffs in said moneys and Funds, it being said

defendants' contentions that by breaches of said collective bargaining agreement there is a waiver thereof (prescriptive right of defendants to continue said breaches without judicial remedy of plaintiffs therefor).

Wherefore the plaintiffs Fred A. Alexander, Louis P. Camarota, George Cathro, Albert S. Dimond, Lewis Freeman, Frank Marani, Ray C. Marvin, James Newell and Earl D. Petersen, and each of them, pray judgment against the defendants as follows:

1. That the court direct and order in the nature of a writ of mandate the defendant Joint Clerks Labor Relations Committee to properly register the plaintiffs and each of them as ship clerks and enter each plaintiff's name as fully registered under the said collective bargaining agreement (Class A) as of the proper date therefor for each plaintiff.

2. That the plaintiffs have declaratory relief under said complaint, second cause of action, against the defendants PMA, ILWU, Joint Clerks Labor Relations Committee, Port of San Francisco, H. J. Bodine, L. B. Thomas, William Chester, K. F. Saysette, J. A. Robertson and Hubert Brown as Trustees of ILWU-PMA Welfare & Pension Funds; Harry Bridges, H. J. Bodine, L. B. Thomas, K. F. Saysette, R. J. Pfeiffer and Capt. C. Pryor, as Trustees of ILWU-PMA Mechanization Fund as follows:

(a) A determination that the collective bargaining agreement consists only of the writings executed by the bargaining representatives, in writing, and

does not contain any oral provisions nor secret understandings nor waivers arising from defendant's breaches thereof or failure of any defendant to observe said agreement's terms.

(b) That the plaintiffs and each of them as members of the full time working force under said collective bargaining agreement working in the Port of San Francisco, have been and are entitled to equal dispatch and equal job preference with all other members of the working force without preference or priority as to date of employment or registration, including those registered on June 1, 1951, under said prior illegal contract provisions, and that each plaintiff has an equal right to vote for the employee representative of the defendant Committee, and for equal right to vote in the election of the hiring hall dispatchers.

(c) That the plaintiffs and each of them are entitled to all of the compensation provided for employees under the collective bargaining agreement, and not for a lesser sum; that each is entitled to compensation under the said "eight hour rule", and entitled to the fringe benefits (deferred contingent compensation) including vacation pay, for welfare and pension benefits under the said collective bargaining agreement, including insurance and hospital, medical and surgical contract coverage for themselves and their dependents, dental care for their dependents, and that plaintiffs are entitled to be paid on the same basis as all of the members of the working force, and to receive the

benefits under the Mechanization Plan Fund as other members of the working force working who were employed in the Industry in 1958.

3. That the plaintiffs and each of them are entitled to an accounting from PMA, the defendant Trustees of the ILWU-PMA Welfare & Pension Funds, and the defendant Trustees of the ILWU-PMA Mechanization Fund; that there be a determination as to what funds are properly in the Welfare Fund to which the plaintiffs have an equitable interest; that there be a determination as to what funds are properly in said Mechanization Fund or should be paid to or ordered paid to the Trustees of the Mechanization Fund, and what equitable interests the plaintiffs have therein as to each portion held by PMA or said Trustees and that the plaintiffs are entitled to benefits from said fund should they not be employed in any one week sufficient to earn 35 hour straight time pay as in the Mechanization Agreement Supplement provided and for vested interest upon death or retirement as therein provided; that there be a determination as to what portions of the compensations to the plaintiffs has been paid by the various employers of the Shipowners and Stevedoring Companies and that are held by the defendants, for which no benefits have accrued to the plaintiffs therefrom, and that a trust be imposed thereon and that the plaintiffs and each of them have judgment for such unpaid compensation, except as to the funds as are held under the Trusts and that as to them there be a declaration of rights and adjudication of the sums due the plain-

tiffs by such trustee under said collective bargaining agreement. That the plaintiffs have judgment for such compensation for which no benefit has been received, against the defendant PMA, of such funds as it holds or has held for the plaintiffs, together with 7% interest thereon until judgment, and against the Trustees of the various Funds for such benefits as have accrued or in the alternative for such compensation for the plaintiffs for which the time for the benefits have passed, together with 7% interest to the date of judgment.

4. That the plaintiffs and each of them have judgment for damages for breach of contract in the sum of $20,000 each (or such other sum as may be alleged by amendment to the complaint after discovery) against the defendants PMA, ILWU, Ship Clerks Association, Local 34, ILWU, and against said Joint Clerks Labor Relations Committee, an unincorporated association, and in addition, a judgment against such defendants and each of them as damages accrued since the filing of the complaint to the date of judgment for loss of wages or earnings by reason of breach of the collective bargaining agreement.

5. For costs of suit herein incurred.

6. For such other and further or other or further relief, decrees, judgments and/or orders as shall be meet in the premises.

Dated: April 12, 1963

Howard B. Crittenden, Jr.,
Attorney for Plaintiffs.

Subject Index

	Page
The question presented	1
Reasons why the writ should not be granted	2
(1) The stay order is not a final judgment under 28 USC 1291	2
(2) The stay order is not an injunction appealable under 28 USC 1292(a)(1)	4
Conclusion	7

Table of Authorities Cited

Cases	Pages
Armstrong-Norwalk Rubber Corp. v. Local Union No. 283, 269 F.2d 618 (C.A. 2, 1959)	4
Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955)	3, 5, 6
Dawson v. Lummus Company, 368 U.S. 986 (1962)	4
Enelow v. New York Life Insurance Company, 293 U.S. 379 (1935)	5
Ettelson v. Metropolitan Life Insurance Company, 317 U.S. 188 (1942)	5
Goodall-Sanford v. United Textile Workers, 353 U.S. 550 (1957)	2, 3
Greenstein v. National Skirt & Sportswear Association, Inc., 274 F.2d 430 (C.A. 2, 1960)	4
International Longshoremen's and Warehousemen's Union v. Kuntz, ... F.2d ..... (C.A. 9, No. 18981, June 26, 1964)	7

Pages

Jackson Brewing Company v. Clarke, 303 F.2d 844 (C.A. 5, 1962), cert. denied 371 U.S. 891 (1962) 4

King v. Grand Lodge of Machinists, 215 F. Supp. 351 (N.D. Calif., 1963) 6

Kirschner v. West Company, 300 F.2d 133 (C.A. 3, 1961) 4

Lummus Company v. Commonwealth Oil Refining Co., 297 F.2d 80 (C.A. 2, 1961), cert. denied, sub nom..... 4

McLish v. Roff, 141 U.S. 661 (1891)..... 3

Morgantown v. Royal Insurance Co., 337 U.S. 254 (1949) 5

Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935)..... 5

United States v. View Crest Garden Apts., Inc., 265 F.2d 205 (C.A. 9, 1958)..... 6

United States v. Woodbury, 263 F.2d 784 (C.A. 9, 1959) 6

Statutes

28 USC 1291 .....2, 3, 4

28 USC 1292(a)(1) 2, 4, 5

28 USC 1292(b) (Pub. L. 85-919, Sept. 2, 1958, 72 Stat. 1770) 6

Labor Management Relations Act (29 USC 185):
Section 301 .....1, 4, 7

Rules

Rules of the United States Supreme Court, Rule 19 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 343

FRED A. ALEXANDER, et al.,
Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, et al.,
Respondents.

BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THE QUESTION PRESENTED

While the petition argues the merits of petitioner's claims, we submit that the only question properly presented is whether an order of a District Court staying proceedings in a suit brought under Section 301 of the Labor Management Relations Act (29 USC 185), pending arbitration pursuant to the provisions of the contract on which the suit is based, is an appealable order. The Court of Appeals held that it was not and dismissed the appeal. The Court of Appeals

held (1) that a stay of suit in equity pending arbitration is not a final judgment appealable under 28 USC 1291 and (2) that the stay in this case was not an injunction appealable under 28 USC 1292(a)(1). Its ruling was correct on both scores.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The petition fails to assign any of the reasons specified in Rule 19 of the Rules of this Court which would justify the granting of the writ. It does not suggest that there is a conflict between the decision below and that of any Court of Appeals or that the decision below conflicts with any decision of this Court. Indeed a review of the decisions of this Court and of the Courts of Appeals which have considered the question of appealability of a stay order of the kind here involved demonstrates that the decision below is in perfect harmony with the already established case law.

---

(1) THE STAY ORDER IS NOT A FINAL JUDGMENT UNDER 28 USC 1291.

In *Goodall-Sanford v. United Textile Workers,* 353 U.S. 550 (1957), this Court held appealable an order directing arbitration in an action wherein the sole relief sought was the specific performance of an arbitration clause in a collective bargaining contract. Of course, such an order, as contrasted with the stay here granted, was "final" because it was "not merely a

step in the judicial enforcement of the claim nor auxiliary to the main proceeding," but because it constituted "the final relief sought" (353 U.S. at 551). That, of course, is not this case. Furthermore, in *Goodall-Sanford,* this Court was careful to point out that that case was not comparable to *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176 (1955) "which held that a stay pending arbitration was not a 'final decision' within the meaning of 28 USC Section 1291" (353 U.S. at 551).

We submit that controlling on this petition is the *Baltimore Contractors* case which, affirming an order of the Court of Appeals for the Second Circuit (216 F.2d 192 [1953]) dismissing an appeal from a District Court order denying a stay pending arbitration, emphasized the long standing Congressional policy against piecemeal appeals underlying section 1291 and which quoted with approval the following language from the earlier decision in *McLish v. Roff,* 141 U.S. 661, 665 (1891):

> "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal." (348 U.S. at 178)

The view that an order denying or granting a stay pending arbitration (as distinguished from an order to arbitrate where that is the very relief sought) is *not* final within the meaning of Section 1291 and is

therefore not appealable has been consistently followed by the Courts of Appeal. *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283,* 269 F.2d 618 (C.A. 2, 1959); *Greenstein v. National Skirt & Sportswear Association, Inc.,* 274 F.2d 430 (C.A. 2, 1960); *Lummus Company v. Commonwealth Oil Refining Co.,* 297 F.2d 80 (C.A. 2, 1961), cert. denied, *sub nom., Dawson v. Lummus Company,* 368 U.S. 986 (1962); *Kirschner v. West Company,* 300 F.2d 133, 134 (C.A. 3, 1961); *Jackson Brewing Company v. Clarke,* 303 F.2d 844 (C.A. 5, 1962), cert. denied 371 U.S. 891 (1962). Indeed, it has been specifically followed in cases arising, like this one, under Section 301 of the National Labor Relations Act. *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283, supra; Greenstein v. National Skirt & Sportswear Association, Inc., supra.*

Thus the decision below is in complete harmony with the decisions of this Court and of the Courts of Appeals which have considered this question and there is no good reason why this Court should once again have to review this already settled question.

---

(2) THE STAY ORDER IS NOT AN INJUNCTION APPEALABLE UNDER 28 USC 1292(a)(1).

An exception to the finality doctrine of Section 1291 provides for an appeal from interlocutory orders "granting . . . [or] . . . refusing . . . injunctions." 28 USC 1292(a)(1). However, it has long been held that while a stay of a legal proceeding may be an-

alogized to an injunction for purposes of this section, the analogy is not applicable if the stay represents, as it does here, the action of a court of equity controlling the sequence of its own proceedings.

A comprehensive review of the relevant cases is to be found in the *Baltimore Contractors* case where the Court held that the denial of a stay, pending arbitration, in an "equitable action . . . for an accounting" (348 U.S. at 176) was not the refusal of an injunction within the meaning of Section 1292(a)(1). Such a denial was, the Court said, merely "a step in controlling the litigation before the trial court." (348 U.S. at 185). Thus it was clearly distinguishable from the granting or denial of a stay pending arbitration in an action at law for damages for breach of contract (*Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 [1935]) or in an action at law for monies due under an insurance policy (*Enelow v. New York Life Insurance Company*, 293 U.S. 379 [1935]; *Ettelson v. Metropolitan Life Insurance Company*, 317 U.S. 188 [1942]). If the suit, however, were one in equity—for reformation of the contract—the rule would be different. Cf. *Morgantown v. Royal Insurance Co.*, 337 U.S. 254 (1949). Furthermore in *Morgantown*, this Court disposed of the argument that because the order there in question (denial of a jury trial) was of "importance" to the litigation it ought to be appealable, by saying:

> "Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions." (337 U.S. at 258)

In the *Baltimore Contractors* case this Court recognized that the distinction to which it was there adhering had in it "elements of fiction in this day of one form of action" (348 U.S. at 184). However, it was of the view that the question of which orders should be appealable and which should not was a matter for Congress. It therefore concluded:

> "... that it is better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper." (348 U.S. at 185.)

That the action here is essentially equitable is apparent from the gravamen of the complaint. Petitioners seek a mandatory injunction (Ptn. for Cert., App. 51), a declaration of rights (id., 15-53), and an accounting (id., 53-54).

It is interesting to note that one of the amendments which Congress apparently found it "proper" to make after *Baltimore Contractors* was to render appealable interlocutory orders upon a certificate of the District Judge that the order "involves a controlling question of law as to which there is a substantial difference of opinion." (Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770; now 28 USC 1292[b]). Although the District Court (*King v. Grand Lodge of Machinists*, 215 F. Supp. 351 [N.D. Calif., 1963]) and the Court of Appeals (*United States v. View Crest Garden Apts., Inc.*, 265 F.2d 205 [C.A. 9, 1958]; cf. *United States v. Woodbury*, 263 F.2d 784, 787 [C.A. 9, 1959]; *International Longshoremen's and Warehousemen's*

Union v. Kuntz, ... F.2d ..... [C.A. 9, No. 18981, June 26, 1964]) have both been liberal in permitting litigants to invoke the new procedure—and have done so in suits brought under Section 301 of the National Labor Relations Act (*King v. Grand Lodge of Machinists, supra, International Longshoremen's and Warehousemen's Union v. Kuntz, supra*)—petitioners did not here seek to avail themselves of the provisions of Section 1292(b).

Since the stay here was not a "injunction" and since petitioners have not brought themselves within Section 1292(b), the clearly interlocutory order of the District Court was not appealable and the decision of the Court of Appeals is unassailable.

CONCLUSION

The Court of Appeals was manifestly correct in dismissing the appeal. Its decision accords with the decisions of this Court and of other Courts of Appeals which have considered the questions. The petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
August 26, 1964.

Respectfully submitted,
NORMAN LEONARD,
Attorney for Respondent International Longshoremen's and Warehousemen's Union.

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No. 343

In the Supreme Court of the United States

OCTOBER TERM, 1964

FRED A. ALEXANDER, et al.,
Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION,
a non-profit corporation, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief for the Respondent Pacific Maritime Association in Opposition

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	4
Argument	7
Conclusion	13

CITATIONS

Cases	Pages
Armstrong-Norwalk Rubber Corp. v. Local Union No. 283, 269 F.2d 618 (2 Cir. 1959)	9
Atkinson v. Sinclair Refining Co., 370 U.S. 238	8
Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176	9, 10
Barker v. Southern Pacific Co., 214 F.2d 918 (9 Cir. 1954)	12
City of Morgantown v. Royal Insurance Co., 337 U.S. 254	10
Drake Bakeries, Inc. v. Local 50, 370 U.S. 254	12
Durandetti v. Chrysler Corporation, 195 F. Supp. 653 (E.D. Mich. 1961)	13
Ferro v. Railway Express Agency, Inc., 296 F.2d 847 (2 Cir. 1961)	12
Goodall-Sanford, Inc. v. The United Textile Workers, 353 U.S. 550	8, 9
Griggs v. Transocean Air Lines, 176 Cal. App. 2d 843, 1 Cal. Rptr. 803 (1960)	12
Holderby v. International Union of Operating Engineers, 45 Cal. 2d 843, 291 P.2d 463	13
Hudson Lumber Co. v. U.S. Plywood Co., 181 F.2d 929 (9 Cir. 1950)	10
Humphrey v. Moore, ... U.S. ....., 11 L.ed. 2d 370, 32 L.W. 4055 (Jan. 6, 1964)	10
John Wiley and Sons, Inc. v. Livingston, ... U.S. ....., 11 L.ed. 2d 898, 32 L.W. 4285 (Mar. 30, 1964)	12
Kirschner v. West Company, 300 F.2d 133 (3 Cir. 1962)	9
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41	13
Packinghouse Workers Local 721 v. Needham Packing Co., ... U.S. ....., 11 L.ed. 2d 680, 32 L.W. 4202 (Mar. 9, 1964)	12

Pages

Ross v. Twentieth Century-Fox Film Corp., 236 F.2d 632 (9 Cir. 1956) 9

San Diego Building Trades Council v. Garmon, 359 U.S. 236 4
Smith v. Evening News, 371 U.S. 195 ..... 5, 11
Smith v. General Truck Drivers, 181 F. Supp. 14 (S.D. Cal. 1960) 13

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 11
Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 12

United Steelworkers v. American Manufacturing Co., 363 U.S. 564 ..... 11, 12
United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 12
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 ..... 11, 12

Wilson Brothers v. Textile Workers, 224 F.2d 176 (2 Cir. 1955), cert. den. 350 U.S. 834 9

STATUTES AND COLLECTIVE BARGAINING AGREEMENT PROVISIONS

Labor Management Relations Act, 1947, § 301(a), 29 U.S.C. § 185(a) 2, 5, 7
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 ..... 2, 3, 7
28 U.S.C. § 1292 ..... 2, 3, 7, 9

TEXT

Hamilton, Individual Rights Arising from Collective Labor Contracts, 3 Mo. L. Rev. 252 12-13

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 343

FRED A. ALEXANDER, et al.,
Petitioners.

vs.

PACIFIC MARITIME ASSOCIATION,
a non-profit corporation, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the Respondent Pacific Maritime Association in Opposition

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 332 F.2d 266. The earlier opinion of the court of appeals is reported at 314 F.2d 690. It held that the district court had no jurisdiction over petitioners' original complaint because it was based solely on alleged unfair labor practices, but remanded the case with leave to petitioners

to amend to state a cause of action under § 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a), for breach of the collective bargaining agreement. It is reprinted as pages 1-9 of the appendix hereto.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5) was entered on May 6, 1964. The petition for writ of certiorari was filed August 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether - in an employes' suit brought under § 301(a) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185(a), for alleged breach of the applicable collective bargaining contract and seeking damages and other relief available only in equity - an appeal can be taken under 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1) from an order of the district court staying action upon all further proceedings pending petitioner's exhaustion of their administrative remedies under the contract grievance-arbitration procedures.

We suggest that the other questions set forth in the petition can be ignored.

STATUTES INVOLVED

Jurisdiction of the cause is claimed under § 301(a) of the Labor Management Relations Act, as amended, 29 U.S.C. § 185(a). It reads:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States

having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Appellate jurisdiction is claimed on the basis of 28 U.S.C. § 1291. It reads:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Appellate jurisdiction is also claimed, in the alternative, on the basis of 28 U.S.C. § 1292(a), as amended. It provides in pertinent part:

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

Consideration may also be appropriate to 28 U.S.C. § 1292 (b). It reads:

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he

shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

STATEMENT

Petitioners are ship clerks employed in the San Francisco Bay Area. International Longshoremen's and Warehousemen's Union (ILWU) is the certified collective bargaining agent for ship clerks at that port. Pacific Maritime Association (PMA) is the employers' collective bargaining agent. ILWU and PMA have a collective bargaining agreement covering the terms and conditions of employment of ship clerks in San Francisco. Many ship clerks are registered; others, including petitioners, are not. The distinction is described in some detail in an answer to an interrogatory (Tr. R. 137-149; PMA App. 10-14).

Petitioners' original complaint was that ILWU and PMA cooperated in discriminating against petitioners - who are not members of ILWU - and in favor of union members as to employment and employment benefits under the collective bargaining agreement. The district court in an unreported decision dismissed the complaint on the ground that jurisdiction over the alleged unfair labor practices lay exclusively in the National Labor Relations Board under *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, so that petitioners had no standing to sue in the district court for breach of contract. The court of appeals, 314 F.2d 690 (PMA App. 1-9), held that the complaint as then phrased did not allege a breach of contract and ac-

cordingly concurred in the district court's ruling as to jurisdiction. The court of appeals also noted that in *Smith v. Evening News*, 371 U.S. 195, an opinion filed while the appeal was pending, this Court had stated that individual employes otherwise having standing to sue might bring an action under § 301(a) of the Labor Management Relations Act for breach of the applicable collective bargaining agreement even though the acts complained of were also unfair labor practices. The court of appeals remanded with leave to amend to state such a cause of action.

The amended complaint (Pet. App. 7-54) alleges the existence of a collective bargaining agreement between ILWU and PMA covering the terms and conditions of employment and compensation and other benefits of ship clerks[1] and alleges it includes provisions that "there shall be no discrimination in connection with any action subject to the terms of this agreement either in favor of or against any person because of membership or non-membership in the union" and requiring the maintenance of an adequate working force of ship clerks.[2] The amended complaint also restates the original charges of unlawful discrimination in respect to various provisions of the collective bargaining agreement.[3] This complaint, if brought during the days of separate law and equity proceedings, could have been heard only in equity. It prays for a declaration of the rights of petitioners under the agreement, a mandatory injunction directing compliance with the collective bargaining agreement, an accounting by ILWU and PMA, the imposition

1. Pet. App. 8, 10, 13, 14, 16, 23, 25, 34.

2. Pet. App. 15.

3. Pet. App. 16, 17, 19, 20, 22, 23, 25, 28, 29, 41, 44. These claims were held beyond the jurisdiction of the courts in the earlier opinion in 314 F.2d 690 (PMA App. 1-9).

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of a trust in petitioners' favor upon funds held by the trustees of union-employer welfare and pension funds, and damages, including loss of wages, by reason of breaches of the collective bargaining agreement.[4]

Respondent PMA filed motions for a separate trial on the issue of standing to sue, to strike allegations held beyond the court's jurisdiction in the earlier opinion (PMA App. 10-14), for a more definite statement, for summary judgment, to dismiss for lack of jurisdiction, and for a stay of proceedings pending exhaustion of administrative remedies under the grievance and arbitration provisions of the collective bargaining agreement.[5] Petitioners moved for an order imposing sancitions on PMA for its alleged failure fully to answer petitioners' interrogatories.[6]

Summary of reasons why a writ should not be granted.

The court of appeals held that petitioners were premature in taking an appeal from a district court order staying court action in a suit seeking equitable relief for alleged violations of a collective bargaining contract until petitioners exhausted the contract grievance-arbitration procedures that were available to them. This order stayed action on respondent's motions for a separate trial on the issue of standing to sue, to strike, for a more definite statement, to dismiss for lack of jurisdiction and for summary judgment as well as staying action sought by petitioners.

The governing rules of law, which were correctly applied by the court of appeals, are clear and are uniformly applied by this Court and all the circuits. The stay was a step in the judicial consideration of multitudinous claims presented in the complaint, which sought an accounting and other relief

4. Pet. App. 51-54.

5. See Tr. R. 119-123; 59; 57-59; 57; 56-57.

6. See Tr. R. 150-168.

in equity. The order was in no sense final, for the district court retained jurisdiction while withholding action until there was a resolution of such issues as are presentable through the contract grievance-arbitration procedures. The stay order, having been entered by a court that was already exercising equity jurisdiction at the instance of petitioners' complaint, was not an injunction against proceeding with an action at law. Accordingly the stay order of the district court was not appealable under § 1291 or § 1292(a)(1).

Denial of the writ will not preclude the raising of important issues on appeal from interlocutory orders where such is proper. Congress has provided that interlocutory appeals on important issues can be presented under 28 U.S.C. § 1292(b). The steps to perfect an appeal thereunder were not taken here. In appropriate cases they can be taken.

The substantive issues here claimed to be important are of no merit.

ARGUMENT

The principal question presented to this Court on the pending petition is whether, in a suit under § 301 of the Labor Management Relations Act seeking equitable relief for alleged breaches of a collective bargaining agreement, an order is appealable that stays all court proceedings until there shall have been compliance with the contract requirement that there be resort to the grievance-arbitration provisions of the agreement with respect to the alleged breaches. Petitioners' "Question Presented" numbered 4 may perhaps be fairly subsidiary to the basic substantive issue whether compliance with arbitration procedures was properly ordered by the district court. Petitioners' "Questions Presented" numbered 5, 6 and 7 relate to possible unfair labor practices, which are outside the jurisdiction of the district court and hence were not carried forward to the court of

appeals or properly includable in this petition. These issues were disposed of by an earlier court of appeals opinion reported at 314 F.2d 690 (PMA App. 1-9). Questions numbered 2 and 3 seek to present issues as to the validity of the ILWU-PMA collective bargaining agreement. Such matters are not proper for consideration on this petition.

The court of appeals directed its attention to the single question whether the stay pending exhaustion of the administrative remedy was immediately appealable.

Petitioners present no basis for granting a writ of certiorari under the rules of this Court.

The petition for a writ of certiorari should be denied because the court of appeals judgment is in accord with decisions of this Court, because there are no decisions of courts of appeals in conflict with the decision below, and because to follow the grievance-arbitration provisions of the collective bargaining agreement will not cause petitioners unjustifiable injury.

1. The decision of the court below is supported by the decisions of this Court.

Goodall-Sanford, Inc. v. The United Textile Workers, 353 U.S. 550, on which petitioners principally rely, is not contrary to the decision below. In that case a labor union instituted an action for the purpose of obtaining specific performance of an arbitration provision in its collective bargaining agreement. The holding of this Court that the district court's order for specific performance was a final judgment and therefore appealable was specifically based on the ground that it granted all the relief that had been prayed for. The facts in the instant case are fundamentally different; petitioners did not ask simply that the court require respondents to use the grievance-arbitration procedure, they sought a variety of remedies for contract

breach. The *Goodall-Sanford* opinion also distinguishes a stay order from a decree specifically enforcing plaintiff's demand that defendant come into the grievance-arbitration procedure. The latter, but not the former, is a final decision within the meaning of 28 U.S.C. § 1291. To the same effect, see *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283*, 269 F.2d 618 (2 Cir. 1959).

The decision of the court below that the district court order is not an injunction appealable under 28 U.S.C. § 1292(a)(1) is similarly in accord with the decisions of this Court. Here the petitioners' complaint called upon the district court to exercise equity jurisdiction. In doing so, it stayed further proceedings with regard to the petitioners' clairs. It entered a stay order. Petitioners claim this is an appealable injunction. The *Baltimore Contractors* opinion analyzes this problem in detail. It concludes that a stay order entered by a court that is already exercising equity jurisdiction is not an injunction but is merely a "step in controlling the litigation before the trial court". While the opinion recognizes that this conclusion is based on a distinction that has in it "elements of fiction in this day of one form of action", it holds that this distinction continues to be appropriate in interpreting the long-standing statutory provisions as to appealability of interlocutory orders. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 182-185; *Wilson Brothers v. Textile Workers*, 224 F.2d 176 (2 Cir. 1955), *cert. den.* 350 U.S. 834.

2. There is unanimity among the circuits that orders staying equity proceedings pending arbitration under collective bargaining provisions are not appealable. *Ross v. Twentieth Century-Fox Film Corp.*, 236 F.2d 632, 633 (9 Cir. 1956); *Kirschner v. West Company*, 300 F.2d 133, 134 (3 Cir. 1962); *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283*, 269 F.2d 618, 620-621 (2 Cir. 1959).

Petitioners cannot rely on *Hudson Lumber Co. v. U.S. Plywood Co.*, 181 F.2d 929 (9 Cir. 1950) since that decision must be now regarded as having no weight in view of the decisions of this Court in *City of Morgantown v. Royal Insurance Co.*, 337 U.S. 254 and *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, and the more recent decisions of the Ninth Circuit.

3. Petitioners will not be unjustifiably hurt by exhaustion of the contractual arbitration provisions: If the arbitrator finds that petitioners' rights were violated by their employer, appropriate relief will be granted by the arbitrator or by the court on the basis of the arbitrator's findings. If petitioners are dissatisfied, they then have their remedies in the courts. *Cf. Humphrey v. Moore*, ... U.S. ....., 11 L.ed. 2d 370, L. W. 4055 (Jan. 6, 1964).

The petitioners do not raise any issue on the merits that would justify this Court in granting a writ.

Petitioners complain that they, not having been registered by joint action of ILWU and PMA under the registration provision of the collective bargaining contract, are denied the conditions the contract gives only to those having been so registered.[7] Petitioners would have all the relief they seek if they were given registered status with all the prequisites thereof. The district court has required petitioners to seek such status through the contract grievance-arbitration procedures.

The fundamental position of petitioners is that individual employes should not have to follow the grievance procedure

7. The explanation regarding the nature and process of registration and its significance to decasualization of waterfront work on the Pacific Coast - which respondent PMA has given in answer to an interrogatory - is set forth in Appendix 2 (PMA App. 10-14).

of their collective bargaining contract if they choose to proceed under the contract, rather than before the Labor Board, to litigate claims that their union and their employer have acted in a way that is both a contract violation and an unfair labor practice. Petitioners attack the actions of the union and the employer in the negotiation and administration of the collective bargaining contract, asserting that they are discriminating against the plaintiffs because of their lack of union membership. Petitioners contend that the union and the employer are more than equal adverse parties in the grievance-arbitration procedure of the collective bargaining contract and, therefore, that the individual employe should not have to follow the contract grievance-arbitration procedure. There are at least three answers to this contention.

1. A controlling difficulty with this contention is that petitioners voluntarily chose to litigate under their contract and to rely on the *Smith v. Evening News* doctrine limiting the pre-emption principle. When petitioners chose to litigate under the contract rather than before the Labor Board, they necessarily chose to accept the contract grievance-arbitration procedure as the initial step in their litigation. Had they wished to avoid using the grievance-arbitration procedure they might have followed the usual course of presenting their contentions in a Labor Board charge.

2. The federal labor law requires exhaustion. The requirement of exhausting the grievance-arbitration procedures of the collective bargaining contract is unassailably established as a vital and essential part of federal law being fashioned in this area of labor relations. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448; *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574;

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593; *John Wiley and Sons, Inc. v. Livingston*, ... U.S. ....., 11 L. ed. 2d 898, 32 L. W. 4285 (Mar. 30, 1964). These cases hold that the duty to arbitrate should be enforced "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the alleged dispute", *Warrior and Gulf, supra*, and that the trial courts have no business to weigh the merits of the grievance nor determine whether the particular language in the contract will support the claim, where the contract calls for submission of all grievances to arbitration and the court determines that the contract calls for arbitration of the alleged grievances. *United Steel Workers v. American Manufacturing Co., supra; John Wiley and Sons v. Livingston, supra; Drake Bakeries, Inc. v. Local 50*, 370 U.S. 254; *Packinghouse Workers Local 721 v. Needham Packing Co.*, ... U.S. ....., 11 L.ed. 2d 680, 32 L. W. 4202 (Mar. 9, 1964). The policy of this line of cases extends to grievances of employes.[8]

3. The exhaustion principle normally applies to all persons who have an administrative remedy, including even those claiming the administrative tribunal itself is engaged in a violation of the law. Where an employe asserts a claim of violation of a contract that gives him a grievance-arbitration remedy for his claim, he is bound to exhaust the grievance-arbitration procedure before going to court. *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653; *Barker v. Southern Pacific Co.*, 214 F.2d 918 (9 Cir. 1954); *Griggs v. Transocean Airlines*, 176 Cal. App. 2d 843, 846, 1 Cal. Rptr. 803, 805. The basic doctrine was well set forth by Fowler Hamilton in *Individual Rights Arising*

8. Compare *Ferro v. Railway Express Agency, Inc.*, 296 F.2d 847 (2 Cir. 1961).

from Collective Labor Contracts, 3 Mo. L. Rev. 252, 267. This basic doctrine accords with the general doctrine that administrative remedies be exhausted before recourse to the courts, even though the administrative remedy is before the particular agency that is attacked as engaging in unlawful activity. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Holderby v. International Union of Operating Engineers*, 45 Cal. 2d 843, 291 P.2d 463; *Smith v. General Truck Drivers*, 181 F. Supp. 14 (S.D. Cal. 1960); *Durandetti v. Chrysler Corporation*, 195 F. Supp. 653 (E.D. Mich. 1961). Only after there has been an exhaustion of these remedies in an effort to get redress for the alleged grievances can it truly be said that there is a contract violation claim that is ripe for judicial consideration at the instance of one with standing to sue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

RICHARD ERNST
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Attorneys for Respondent
Pacific Maritime Association

San Francisco, California
August 26, 1964

(Appendices Follow)

Appendix 1

United States Court of Appeals
for the Ninth Circuit

No. 18,324 — Feb. 28, 1963

Fred A. Alexander, Louis P. Camarota, George Cathro, Albert S. Dimond, Lewis Freeman, Frank Marani, Ray C. Marvin, James Newell and Earl D. Petersen,
Appellants;

vs.

Pacific Maritime Association, a non-profit corporation; International Longshoremen's & Warehousemen's Union, an unincorporated association; Ship Clerks Association, Local 34, ILWU, an unincorporated association; Joint Clerks Labor Relations Committee, San Francisco, an unincorporated association; H. J. Bodine, L. B. Thomas, William Chester, K. F. Saysette, J. A. Robertson and Hubert Brown as Trustees of ILWU-PMA Welfare & Pension Funds; Harry Bridges, H. J. Bodine, L. B. Thomas, K. F. Saysette, R. J. Pfeiffer, and Capt. C. Pryor as Trustees of ILWU-PMA Merchanization Fund; Does One thru Twenty,
Appellees.

Upon Appeal from the United States District Court
for the Northern District of California
Southern Division

OPINION

Before: Pope, Hamlin and Merrill, Circuit Judges

Merrill, Circuit Judge

This appeal is taken from judgment of the district court dismissing the action of the appellants upon the ground that the complaint did not state a claim within the court's jurisdiction. The holding of the district court was that the appellants were complaining of unfair labor practices under the National Labor Relations Act which were initially within the exclusive jurisdiction of the National Labor Relations Board. The correctness of this determination is the issue upon appeal.

Appellants are ship clerks employed at the Port of San Francisco. They are not union members. The central theme of their complaint is that the International Longshoremen's and Warehousemen's Union, their bargaining agent, with the co-operation of Pacific Maritime Association, the employers' bargaining agent, has discriminated against them and in favor of union members in the manner in which employment and employment benefits have been dispensed under the collective bargaining agreement.

Since the complaint charges both the union and the employer with discrimination against appellants solely on the basis of their nonunion status, §§ 8(a)(3), 8(b)(2) of the National Labor Relations Act would arguably apply to the conduct to which appellants object.[1] Accordingly, the dis-

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1. Under § 8(a)(3) an employer is prohibited from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage • • • membership in any labor organization." Section 8(b)(2) places an equivalent restraint upon unions, by making it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection a(3) • • •." Finally, it is unfair labor practice, falling within § 8(b)(1), for a union to restrain or coerce employees in the exercise of § 7 rights, including the right to refrain from engaging in union activities.

trict court ruled, under San Diego Building Trades Council v. Garmon (1959) 359 U.S. 236, that initial jurisdiction lay exclusively with the National Labor Relations Board.

Appellants assert that this constituted error. They rely upon a line of cases which recognizes federal court jurisdiction to enforce the duty of fair representation owed by the unions to those they represent. Those cases, however, do not support appellants' contention. In none of them was there available any administrative remedy which would serve to deprive the federal courts of jurisdiction. Therefore the doctrine of primary jurisdiction of the National Labor Relations Board never was brought into play.

Many of the cases cited arose under the Railway Labor Act, which makes no provision for administrative means for correcting breaches of the duty of fair representation.[2] The remaining cases cited involved acts of discrimination which were not, even arguably, unfair labor practices under the National Labor Relations Act. As an example, the discrimination charged in Syres v. Oil Workers (1956) 350 U.S. 892, and Hardcastle v. Western Greyhound Lines (9 Cir. 1962) 303 F.2d 182, was against union members and was clearly not antiunion in character. Further, as distinguished from Radio Officers Union v. National Labor Relations Board (1954) 347 U.S. 17, there was in those cases no charge that the discrimination was aimed at securing active rather than merely passive union membership.

While resort to the federal courts was proper under those circumstances, it would be improper here in the face of the

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2. E.g., Conley v. Gibson (1957) 355 U.S. 41; Graham v. Brotherhood of Locomotive Firemen (1949) 338 U.S. 232; Tunstall v. Brotherhood of Locomotive Firemen (1944) 323 U.S. 210. Steele v. Louisville & N. R. R. (1944) 323 U.S. 192; Ferro v. Railway Express Agency Inc. (2 Cir. 1961) 296 F.2d 847.

competence of the National Labor Relations Board to handle the alleged discrimination.

If a claim cognizable by the federal courts is stated by the complaint herein, it is not, therefore, for the reasons asserted in the district court, but must be by virtue of § 301 of the Act[3] as construed by Smith v. Evening News Association (1962) 371 U.S. 195. In that case it was held that primary jurisdiction of the board does not apply to prevent the bringing of suit in the federal courts by an individual employee for violation of a collective bargaining agreement.

The opinion in that case was handed down by the Supreme Court while this appeal was pending. By that opinion the law was first established (contrary to the holding in Association of Westinghouse Salaried Employees v. Westinghouse Corporation (1955) 348 U.S. 437) that a claim of damages for breach of a collective bargaining agreement might under § 301 be asserted by an individual employee.[4] Since, in the court below, it was not understood that such was the law, the complaint is not couched in § 301 terms and the applicability of that section as construed in Smith v. Evening News is presented for the first time upon this appeal. This is the question to which we address ourselves.

The complaint alleges that ILWU is the exclusive collective bargaining agent for all ship clerks in the maritime

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3. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

4. It should be noted that Smith v. Evening News specifically left undecided the question of the standing of employees to sue upon the various clauses of collective bargaining contracts. 371 U.S. 195, 201 n. 9.

industry on the Pacific Coast; that Local 34 is the organization designated by ILWU to represent ship clerks under that agreement for the Port of San Francisco; that Pacific Maritime Association is an Association of ship owners and maritime employers and is the collective bargaining agent for its members; that ILWU and Pacific Maritime Association have entered into a collective bargaining agreement which governs the employment of ship clerks in the Port of San Francisco.

The complaint alleges:

"That said bargaining agreement contains provisions that persons employed as Ship Clerks thereunder who constitute the full-time working force and depend on such work as Ship Clerks for their livelihood are designated as 'registered' Ship Clerks in said written agreement in contrast to those who are only seasonal or occasional members of the working force of Ship Clerks and who depend upon other employment for their principal livelihood and are not permanent full-time members of the regular working force. That said bargaining agreement designates said 'registration' and under Sec. 14 of the Master Agreement for Checkers and Related Classifications, there is provided:

'(a) All registration shall be by mutual consent, except that this section shall not deprive either party to the agreement from demanding additions to or subtractions from the registration lists as may be necessary to meet the needs of the port. When objecting to the registration of any man, members of the Joint Port Labor Relations Committee shall be required to give reasons therefor.

'(b) When it becomes necessary to drop men from the registration list, seniority on the list shall prevail.'

"That Sec. 15 of the Agreement provides:

'(a) When it becomes necessary to add men to the registration list, first preference of registration shall be given to men who now have partial or limited registration and employment in the industry; second preference of registration shall be given to men with previous registration in the industry who were not de-registered for cause; third preference of registration shall be given to men who had partial or limited registration in the industry and who were not de-registered for cause.

'(b) Suitable personnel with clerical background or experience in the maritime industry, longshoremen and other workers covered by contracts with the PMA and ILWU shall likewise be accorded preference of registration after the application of the preceding paragraph in registering additional clerks.' "

It is then alleged in substance that under the terms of the agreement registration is accomplished by the Joint Clerks Labor Relations Committee, which is composed of two members, one selected by Pacific Maritime Association and one by Local 34; that through its representative on this committee Local 34 has arbitrarily prevented the addition of names to the registered list and thus has prevented the registration of these appellants or of any ship clerks who are not union members.

It is further alleged:

"That within four years last past, on numerous occasions, and on February 9, 1962, each of the plaintiffs has duly and regularly requested and demanded that he be duly enrolled and 'registered' as a Ship Clerk by the defendant COMMITTEE under said bargaining agreement, but said COMMITTEE has and

does now wrongfully refuse, neglect and fail, without just cause or excuse, to enroll said plaintiffs or any of them as 'registered' Ship Clerks, but has and does now 'register' others who joined said industry and said permanent working force subsequent to said plaintiffs. That some of those in said four-year period to whom defendant COMMITTEE has granted 'registration' in preference to the plaintiffs, in violation of Sec. 15 of said Master Agreement, had no experience in the Maritime industry at the time of their said 'registration.' That each of the plaintiffs is entitled to 'registration' (and preference therefor) under said bargaining agreement to designate each a member of the full-time working force of Ship Clerks in the Port of San Francisco under said agreement, but said defendant JOINT COMMITTEE had and does now fail, refuse and neglect to make the ministerial act of entering each of said plaintiff's names into such list of full-time Ship Clerks employed in the Port of San Francisco, working under said bargaining agreement."

The complaint further alleges the manner in which appellants have suffered injury by virtue of this discrimination, including loss of vacation pay, contingent deferred wages and welfare, pension and health benefits.

The question is whether the alleged acts of discrimination constitute a breach of the collective bargaining agreement as well as an unfair labor practice under the act. In our view, they do not.

In Smith v. Evening News the breach was of a clause providing that there should be no discrimination against any employee because of union membership. No such clause

appears in the agreement before us. Section 3 of the agreement states:

> "There shall be no favoritism or discrimination in the hiring or dispatching or employment of any clerk qualified and eligible under the agreement * * *."

Appellants do not claim breach of this clause, and it is clear from other provisions that the agreement not to discriminate does not refer to the initial registration process, to which appellants object, but to the subsequent hiring, dispatch and employment of clerks already registered.

Appellants' case for a breach of contract, as we understand it, is restricted to this: that under § 14 the registered list is to be maintained at such dimensions as will meet the needs of the Port of San Francisco; that it is not so maintained that if it were, then under § 15 these appellants would be registered; that the failure of the joint committee to register these appellants is thus a breach of contract.

But the contract as alleged does not say this. There is no promise to maintain the registration at any level. The parties to the agreement may demand additions to meet the needs of the port, but there is no allegation that such a demand has been made. It may be that Local 34 owes these appellants a duty to make such a demand (they themselves having demanded registration), but if so such duty springs from the local's relationship to these appellants and not from the terms of the collective bargaining agreement.

We conclude that the complaint in its present form does not state a claim for breach of contract under § 301.

This is not to say, however, that the complaint cannot under any conceivable state of facts be amended to state a claim. We do not know, for example, that the parties to the agreement have not demanded additions to the regis-

tered list. Nor do we have any information (in the absence of any allegation of the relevant provisions of the agreement) respecting the contractual status of vacation pay and other fringe benefits. Leave to amend should therefore be granted.

Leave to plead further is, we feel, also justified by the fact that Smith v. Evening News has provided a potential basis for relief entirely different from that with which the parties and the district court were concerned.

Reversed and remanded with instructions that judgment be set aside; that leave be granted appellants within such time as may be fixed by the district court to file an amended complaint and for such further proceedings as may thereafter be appropriate.

(Endorsed) Opinion Filed Feb. 28, 1963.

Frank H. Schmid, Clerk.

Appendix 2

Excerpt from PMA's answer to petitioners' interrogatory with respect to the meaning of "registration" on the Pacific Coast waterfront.

The word "registration" is used in the present collective bargaining agreement and in the past collective bargaining agreements affecting ship clerks employed by employers represented by Pacific Maritime Association. It was used in the 1935 National Longshoremen's Award entered by the arbitrators appointed by President Roosevelt to settle the 1934 Pacific Coast maritime strike (Ex. E, Dep. of J. Paul St. Sure). The process of registration was required by that award as an element of the decision that there should be decasualization of longshore work on the Pacific Coast. The word "registration" defines the formal procedure by which ship clerks having full (Class A) [137] registration and those having limited (Class B) registration are given status as registered ship clerks in carrying out the decasualization of ship clerk work and are given identifications for purposes of administration of the collective bargaining agreement.

Persons having full (Class A) registration are those who remain from the original registration list developed in the thirties plus those who have been granted full (Class A) registration by action of the Joint Port Labor Relations Committee since the establishment of the initial list. The procedures under which applications are taken for the status of full (Class A) registered ship clerks are set forth in Exhibits 22, 23, 24 and 25 of the deposition of Paul St. Sure. The persons having limited (Class B) registration as ship clerks are those who have been placed on the limited (Class B) registration list by action of the Joint Port

Labor Relations Committee pursuant to the procedures adopted under the collective bargaining contract for the selection of such persons. Details in regard thereto are set forth in Exhibits 22, 23, 24 and 25 of the Deposition of Paul St. Sure. In addition to the men who have registration status other men do ship clerks' work in the Port of San Francisco without such status; these others have the designation "casual", "extra" or "Social Security" ship clerks and other similar designations to indicate that such men have not achieved registration status.

Registration status is first obtained as the result of filing a formal written application for a job as a limited (Class B) registration ship clerk when notice is publicly given that the Joint Labor Relations Committee will be taking applications. Copies of the forms of notice and applications used in the past are set forth in said Exhibits 22, 23, 24 and 25. A [138] copy of the 1963 application form is attached hereto. The Joint Labor Relations Committee reviews the applications filed in response to its notice that applications are being taken on the basis of applicable standards. Those previously used are set forth in said Exhibits 22, 23, 24 and 25. In substance, these are the objective tests to determine who are the best available applicants for ship clerks' jobs to do steady work on a permanent basis, working as interchangeable employees of the members of the Pacific Maritime Association in the San Francisco Bay Area and perhaps other employers who participate in their employment. The fully registered (Class A) ship clerks have first call on the assignment of all work as ship clerks in the San Francisco Bay Area - either by dispatch through the dispatching halls or through the continuing at will relationship with one particular employer - and normally will work until death or retirement or promotion to a job outside the

collective bargaining unit. The employers have successfully insisted that the tests for registration as full (Class A) registered ship clerks will be the most rigorous obtainable to determine whether such persons are the best men for those permanent and steady jobs. The limited registration (Class B) ship clerks have met certain of these tests for steady lifetime employment (when they become limited (Class B) registered clerks) and are in the process of going through a probationary period leading up to submission of applications for fully registered Class A registered status. The fully registered (Class A) ship clerks have permanent steady jobs based on their registration as such after having become limited (Class B) registration clerks, having adequately met the tests of probationary permanent employees during the period of limited (Class B) status and having met the subsequent tests applied by the Joint Labor Relations [139] Committee for full registration.

While the terms of registration of individual men provide that they may be deregistered if they are not needed to carry on the work in the port, outside of war periods it has been the policy of the employers and the unions to refrain from adding men to the list except where there is a reasonable expectation that such men will have permanent steady jobs until death, retirement or promotion outside the bargaining unit. Furthermore, the parties to the contract believe that such men should be in a position to have consistent substantial earnings on a permanent basis if they are to be given such a registration status by the Joint Labor Relations Committee. During recent years, when the industry has been engaged in a program of automation and mechanization, the parties have been unable to determine the exact number of men that could be given permanent steady jobs with the assurances referred to above and, accordingly, they

have not added men to the registration list during the period from 1957 to 1963.

Men [not registered] . . . either have not taken or have failed the tests for registered status. They are employed without meeting the rigorous standards for registration because they are used to work when there are insufficient registered men. They are not part of the registered work force of ship clerks who have passed the tests for either probationary or permanent registered status. Men who do not have registered status do not have the obligations to the industry or to the other registered ship clerks that are necessary incidents to their status of registered men. They can come and go as they wish and, in turn, they are [140] employed only on a day-to-day basis when needed and are subject to termination from the waterfront on any day with or without cause.

The steady, permanent jobs of registered men have many of the attributes of civil service jobs of government employees. The fully registered (Class A) ship clerk has tenure similar to a man who has attained permanent civil service status. The limited (Class B) registration ship clerk has a tenure similar to a man who has probationary civil service status and is moving toward permanent civil service status. The extra. casual, Social Security, etc. ship clerk has tenure comparable to a temporary employee such as for Christmas employees in the Post Office.

As a result of the decasualization program among longshore employees ("longshoremen" and "ship clerks") on the Pacific Coast, the quality of the worker is very high in comparison with similar workers in other portions of the world where such decasualization has not taken place. The desirability of the job, and hence the quality of the worker,

has been very high because of the permanent status that a registered ship clerk has, the regularity of his earnings, the other elements of security in the job which has been given to him, etc. The registered men have developed a status in the community, far different from that of casual waterfront workers in other parts of the world, arising out of their registered status, the pay procedures which lead to the pay check coming to the home rather than being cashed on the waterfront, etc. A man acquires this because he has met the prescribed tests and obtained, through the formal registration procedures of the Joint Labor Relations Committee, a permanent steady job having the described attributes, tenure, status and other qualities. **[141]**

[The copy of the six page 1963 registration form, which is attached to the answers to the interrogatory (Tr. R. 142-149), is not reprinted in this appendix.]